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Utah Court of Appeals

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Mark O. Morris; Snell & Wilmer; Attorneys for Appellee.
Stephen Quesenberry; Hill, Johnson & Schmutz; Attorneys for Appellants.

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IN THE COURT OF APPEALS, STATE OF UTAH

DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and, GUY HATCH, Appellants (Defendants below), vs. MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Appellees (Plaintiffs below).	APPELLANTS' BRIEF Appeal Case No. 991027-CA Priority No. 15

Appeal from the Fourth Judicial District Court, Utah County, Case Number 970400584, Judge Ray M. Harding, Jr. presiding.

Attorneys for Appellee (Plaintiffs below):
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FILED
Utah Court of Appeals
MAY 08 2000
Julia D'Alessandro
Clerk of the Court

ORAL ARGUMENT REQUESTED

FILED
Utah Court of Appeals

SEP 07 2000

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Michael Morris, Elizabeth Morris, and John Covey, Plaintiffs and Appellees, v. Dan Parkinson, Cynthia Parkinson, Linda Hatch, and Guy Hatch, Defendants and Appellants.	ORDER CONCERNING APPELLEES' EXPEDITED MOTION Case No. 991027-CA

This matter is before the court on appellees' "Rule 31 motion for expedited decision." Appellees contend that the issues on appeal can be resolved easily because they are not complicated and are governed by existing Utah law. Appellees do not argue that the appeal should be calendared before cases with a higher priority. Accordingly, IT IS HEREBY ORDERED that appellees' motion for expedited decision is deferred until the case is assigned to a panel for disposition. Once the appeal is assigned to a panel, it will determine whether a decision can be rendered without a written opinion.

Dated this 6th day of September, 2000

FOR THE COURT:

Norman H. Jackson,
Associate Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on September 7, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

MARK O. MORRIS
SNELL & WILMER
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Dated this September 7, 2000.

By Janet Alexander
Deputy Clerk

Case No. 991027-CA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules:

JURISDICTIONAL STATEMENT

Utah Rules of Appellate Procedure 3(a) confers jurisdiction on this appellate court to decide this appeal from a district court in a civil matter. A notice of appeal was timely filed on November 29, 1999.[1]

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue No. 1: Should the trial court have granted Defendant's Motion for Partial Summary Judgment?

Denial of summary judgment is reviewed by the appellate court under a "de novo" standard, with no deference given to the trial court. Brown v. Weiss, 871 P.2d 552, 559 (Utah App. 1997).[2]

Issue No. 2: Did the trial judge err in denying Defendants' Motion in Limine?

Most of the motion in limine ruling will be reviewed under an "abuse of discretion" standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992). The rulings on II(I) and II(J), which are legal rulings, are reviewed under a "correctness" standard. State v. Snyder, 932 P.2d 120, 125 (Utah App. 1997).[3]

Issue No. 3: Did the trial court err in failing to instruct the jury on (1) caveat

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[1] See Addendum, tab H, for copy of notice of appeal.

[2] Defendant's motion for summary judgment and the trial court's oral denial of Defendant's motion (preserving the issue) are found in the Addendum, under tab "A".

[3] Copies of the relevant motions in limine, and the Court's oral ruling (thus preserving the issue), are found in the Addendum, under tab "B".

emptor and (2) knowledge at the time of entering a warranty (Defendants' Proposed Instructions D-1 (later referred to as Instruction 37), and D-2 (later referred to as the warranty instruction))?

Rulings on jury instructions are reviewed are reviewed under a "correctness" standard. Sumerill v. Shipley, 890 P.2d 1042, 1043 (Utah App. 1995).[4]

Issue No. 4: Did the Court err in granting an award of attorneys fees to Plaintiff?

Because this is a legal question, the Court's ruling is reviewed for "correctness". Summerill, 890 P.2d at 1043.[5]

Issue No. 5: Did the trial court err in the amount of attorneys fees and costs that it awarded to Plaintiffs?

The standard of review for attorneys fees awards is "abuse of discretion". Foote v. Clark, 962 P.2d 52, 56 (Utah 1998).[6]

Issue No. 6: Is the jury verdict awarding damages of $5000 to John Covey against Linda Hatch supported by the evidence?

This issue was preserved in the motion for a directed verdict and for JNOV discussed below in Issue 8. A jury verdict is reviewed under a "clearly erroneous"

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[4] Copies of the jury instructions at issue, and the Court's ruling (thus preserving the issue), are found in the Addendum under tab "C".

[5] A copy of the Court's ruling is found in the Addendum under tab "D" (preserving the issue).

[6] The Court's ruling on the amount of attorneys fees is found in the Addendum under tab "E" (preserving the issue).

standard. Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984).

Issue No. 7: Is the jury verdict awarding damages of $9,792.00 against Guy Hatch for real estate agency violations supported by the evidence?

This issue was preserved in the motion for a directed verdict and JNOV discussed in Issue 8, below. A jury verdict is reviewed under a "clearly erroneous" standard. Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984).

Issue No. 8: Did the trial err in denying Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial?

Defendants moved for a directed verdict during trial, and for judgment notwithstanding the verdict after the trial (or in the alternative, for a new trial on certain matters) based on (1) the issues of insufficient evidence as set forth in Issues 6 and 7, above; (2) the issue of caveat emptor (as set forth above in previous issues). Defendants had made a motion for a directed verdict during trial (which was never ruled upon) as set forth in the trial transcript in Volume III, Page 719, lines 10-12.[7] The standard of review for these motions is "if viewing evidence in the a light most favorable to prevailing party, a court concludes evidence is insufficient to support the verdict." Seale v. Gowens, 923 P.2d 1361, 1363 (Utah 1996). The legal decision would be reviewed for "correctness". Summerill, 890 P.2d at 1043. Alternatively, a party is entitled to a new trial where there is insufficient evidence "to justify the verdict" or, the verdict is "against the law." URCP

[7] The JNOV motion and order are found in the Addendum, tab G.

59(a)(7); Braithwaite v. West Valley City Corp., 921 P.2d 997, 1001(Utah 1996).

Issue No. 9: Did the trial court err in not allowing Defendant Guy Hatch to testify about whether the winter when they had resided in the house was cold or whether there was snow on the ground?

This issue was preserved at Volume IV of the trial transcript, pages 933 (line 25) to 934 (lines 1-4), where the trial court sustained Plaintiffs' objection which prohibited Mr. Hatch to testify as to whether it was a cold winter or not. This is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

Issue No. 10: Did the trial court err in not allowing Exhibit 56 E, an enlargement of a photograph offered and entered by Plaintiffs, to be admitted into evidence by Defendants?

This issue was preserved in Volume IV of the trial transcript, at page 944, lines 7-13, where no objection was even made by the Plaintiffs in regard to Defendants' proposed exhibit, yet the trial judge "sustained the duplicative objection". This is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d at 239.

Issue No. 11: Did the trial court err in not allowing Defendants re-direct examination of Guy Hatch?

This issue is preserved in Volume IV, page 999 of the trial transcript, at lines 21-25, where the Plaintiffs' attorney had just finished a twenty question re-cross of the witness. Defendants' attorney stood and ask for re-direct, and was denied the opportunity. This is reviewed under an abuse of discretion standard. State v. Hamilton,

827 P.2d at 239).

Issue No. 12: Did the trial court err in not allowing Mr. Hatch to testify as to his personal observations of the clothing his children wore in the allegedly cold basement?

This issue was preserved in Volume IV, pages 1016 (lines 20-25) to page 1017 (line 1), where the trial court sustained a "duplicative" objection.

This issue is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

Issue No. 13: Did the trial court err in excluding Exhibit 66, a video demonstrating that the house was not cold?

This issue was preserved at Volume III, page 629 (lines 23-25) to page 630 (lines 1-3) where the trial court sustained Plaintiff's objection to this piece of evidence.

This issue is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

Issue No. 14: Did the trial court err in allowing Plaintiff to ask questions on redirect outside the scope of cross examination?

This issue was preserved in Volume III, page 712, lines 12-18, where Plaintiff *Michael Morris is being examined on re-direct.*

This issue is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

Issue No. 15: Did the trial court err in allowing the complete bank records relating to the draws on the construction account to be entered in evidence?

This objection is preserved at Volume II, page 275, of the transcript.

This issue is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992).

Issue No. 16: Did the trial court err in allowing the heating contractor who installed the HVAC system in the house at issue in the lawsuit testify about his "feelings about the occupant of the home as [he] drove by"?

This issue is preserved in Volume II of the trial transcript, at pages 342-43. This is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d at 239.

Issue No. 17: Did the trial court err in allowing Plaintiff's architectural expert to testify about the nature of the crack in a wall (turret)?

This issue is found and preserved Volume II, page 436, lines 2-5, and in Volume II of the trial transcript, page 438 and 439. This is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d at 239.

Issue No. 18: Did the trial court err in allowing Christopher Miller to render expert plumbing testimony?

This issue is found and preserved at Volume II, page 445, lines 21-22, later at page 447 and at page 459. This is reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d at 239.

Issue No. 19: Did the court err in prohibiting the introduction of the Hatch offer to purchase the house before trial for $463,000.00?

This issue is preserved in Volume 1 of the trial transcript, pages 129-133. This is

reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d at 239.

Issue No. 20: Did the cumulative effect of all the above-cited errors create a situation where a fair trial could not and did not take place before the trial court?

This issue is preserved in each of the places mentioned in the previous 19 issues.

The legal decision would be reviewed for "correctness". Summerill, 890 P.2d at 1043.

CONSTITUTIONAL PROVISIONS, ETC. WHOSE DETERMINATION IS DETERMINATIVE OR OF CENTRAL IMPORTANCE

No special interpretation of any particular law is of any significance in this, other than routine arguments from established precedent and rules.

STATEMENT OF THE CASE

Plaintiffs in the District Court action sued the previous owners and the builder of a house in Alpine, Utah for breach of warranty, fraud, etc. Plaintiffs alleged that the house was defective in various ways, some arising before the sale and some after. Plaintiffs also alleged breach of a "side" agreement concerning some improvements that were to be made, and claimed against the realtor Defendant whom they claimed violated professional standards. Plaintiffs sought damages in excess of $200,000.00, but were awarded only $57,000 by the jury. In post-trial proceedings, however, plaintiffs were additionally awarded over $60,000 in attorneys fees and costs. Defendants have appealed (1) denial of Defendants' motion for summary judgment; (2) denial of Defendants' motions in limine and jury instructions; (3) various evidentiary rulings; and (4) denial of certain post-trial motions and rulings (i.e. attorneys fees issues. JNOV, etc.).

STATEMENT OF FACTS

Plaintiffs Michael and Elizabeth Morris purchased a house in the Fall of 1995 from Defendants Dan and Cynthia Parkinson. Trial Transcript, Vol. I, p. 22. In the purchase and sale documents, the Parkinsons provided a written warranty as follows: "Seller warrants all workmanship, habitability, systems of all kinds, and roof for period of two years." Trial exhibit 1. This warranty, as well as the entire purchase and sale contract, was prepared by the Plaintiff's attorney, Mark Morris. Transcript, Vol. I, p. 107-08.

At the time the Plaintiffs purchased the house in question, they were aware of and observed many items in the house that they did not like, intended to repair, or thought were defective, such as shoddy or non-existent "base trim in the kitchen and kitchen cabinets," "the poor quality of all visible finish work," the existence of only one furnace and air conditioning unit at the house, the door construction style, the circular stairway's precarious rail, the slope of the lot, etc. Transcript, Vol. I, p. 126-129.[8] Defendants further acknowledged that they has perceived problems with the following items before purchasing the house:[9] the grade and slope of the area behind the house; the condition and

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[8]Please see also the affidavits submitted by Plaintiffs Michael and Elizabeth Morris in opposition to Defendants' motion for summary judgment, which detail the many defects they were aware of, and are incorporated herein by reference.

[9]These items were listed in Defendants' Motion for Partial Summary Judgment dated December 15, 1998, at ¶9, and in the supporting affidavits are located in the Addendum, tab I.

placement of the window wells; the condition of mesh visible in exterior stucco; the condition of the wood flooring; the placement of the handrail on the circular stairway; the condition and structure of the interior door frames; the design and size of the HVAC system; the condition of the mullion in the den window; the design, size and placement of the exterior steps and walkways; the size of the toilets; the size of the interior stairs; the condition of the chimney caps; the installed condition of window trim and the stained glass window; the condition of wood stair treads; the height of handrails and guardrails; the placement of the rear deck; the extent of landscaping around the deck; the absence of window stools; the absence of base in the kitchen and kitchen cabinets; the placement and number of trees around the house; and the alleged poor quality of all visible finish work.

Plaintiffs claimed that Defendant Guy Hatch, the builder and occupier of the home at the time of purchase, was their real estate agent for the purchase, notwithstanding the fact that they did not have a written agreement with him, did not view any other properties with him, did not prepare the purchase agreement, never contacted the Plaintiffs, and did not pay him a commission. Transcript, Vol. I, p. 111-115.

At the time of the purchase of the house, Plaintiff John Covey (Elizabeth Morris' father) entered into a contract with Defendant Linda Hatch whereby he paid Ms. Hatch $25,000, and she was responsible to perform certain services on the house. Transcript, Vol. I, p. 47.

Plaintiffs Michael and Elizabeth Morris became unhappy with the house, and sued the Parkinsons for breach of the warranty for various alleged defects and shortcomings in

the house. They also sued Defendant Hatch for fraud, and later, a few months before trial, added a claim against Hatch, claiming he was their real estate agent and that he breached his real estate agent responsibilities owed to them. Plaintiff John Covey sued Defendant Linda Hatch for breach of her contract with him. See Amended Complaint.[10]

Defendants brought a timely motion for partial summary judgment relating to issues of warranty and caveat emptor. Their motion was denied.

Defendants made a motion in limine covering a number of issues, which was also denied. Defendants proposed two jury instructions– one regarding warranty and one regarding caveat emptor–which were denied.[11]

At trial, John Covey testified that he had no idea if any of the items in his contract had or had not been completed by Linda Hatch. Transcript, Vol. I, p. 56-57. He testified that he did not know if he had been damaged by the Defendants. Id. The jury awarded him $5,000 anyway. See Verdict Form in Addendum, tab F.

At trial, Plaintiffs, in attempting to prove damages on the realtor claims (in the form of Defendant Guy Hatch's real estate commission), elicited testimony found in the Transcript, Vol. I, page 241, lines 15-21, where Guy Hatch was asked about what his personal commission was on the transaction at issue. Mr. Hatch testified at least twice

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[10] Plaintiff John Covey brought his action in his own name, testified in his own behalf, and was listed separately on the jury verdict form. His legal action is his own.

[11] The parties stipulated to 36 jury instructions, all of which were approved by the trial court and used with the jury. The two instructions at issue were proposed by Defendants and not stipulated to by Plaintiffs.

that he didn't recall what his commission was. No other evidence was presented on this issue. Nonetheless, the jury awarded the Plaintiffs $9,792 in damages.

A key issue in this case was the condition and adequacy of the heating system of the house in question. Defendants had lived in the house through at least one winter. In Volume IV of the trial transcript, pages 933 (line 25) to 934 (lines 1-4), the trial court sustained an objection which prohibited Mr. Hatch to testify as to whether it was a cold winter or not. This fact had not been testified to before by Mr. Hatch.

Plaintiffs for the first time at trial testified of "cold wind" blowing through alleged cracks in the house.[12] Defendant then found a rebuttal (and impeachment) exhibit, a video of the very room in question, on a snowy, cold Christmas morning. The trial court, at Vol. III, pp. 629-30, sustained Plaintiff's objection to this piece of evidence which completely devastated and contradicted their story that cold wind blew through the house. Defendants could in no way have anticipated that Plaintiffs would concoct a story of wind blowing through the middle of their house.

Plaintiffs testified at trial that at the time they purchased the house in question, they were aware of and observed many items in the house that they did not like, intended

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[12] This is brought out by Plaintiff Liz Morris during her direct on the first day of trial. At Volume I, page 80, lines 13-20 of the trial transcript, she claims "you can feel the wind blowing" inside the house, and that "the basement is freezing cold." Plaintiff Liz Morris could not get off of this subject. She later testified that "I like to live in a home where the wind doesn't blow through the walls." Id., Vol. 1, page 140, lines 12-13. This histrionic testimony was not reasonably anticipated, and would have been completely destroyed by the video at issue. Hence, Plaintiffs objected with vigor to the video evidence, because they had been caught in a gross exaggeration.

to repair, or thought were not right, such as "base trim in the kitchen and kitchen cabinets," "the poor quality of all visible finish work," the existence of only one furnace and air conditioning unit at the house, the door construction style, the circular stairway's precarious rail, the lot's slope, etc. Transcript, Vol. I, p. 126-129. See footnote 9, supra.

Defendants attempted to introduce an enlargement of a very important photograph during trial. Transcript, Vol. IV, page 944, lines 7-13 (offered as 56 E). The picture would have allowed the jury to better see the details in this picture. This was a trial where hundreds of photographic exhibits (including other enlargements) were entered. In this case, no objection was even made by the Plaintiffs, yet the trial judge "sustained the duplicative objection". Id.

During the trial, the Plaintiffs' attorney had just finished a twenty question re-cross of Mr. Hatch. Defendants' attorney stood and ask for re-direct, and was denied the opportunity to ask follow-up questions. Transcript, Vol. IV, p. 999. The trial court later sustained a "duplicative" objection when Mr. Hatch tried to testify about what his children wore in the allegedly cold basement. Mr. Hatch had not previously testified on this subject, and it was thus not duplicative. Transcript, Vol. IV, p. 1016-17.

Later in the trial, Plaintiff Michael Morris was examined on re-direct by his own attorney. He is asked about a certificate of occupancy, which was not brought up during either direct or cross examination. Defendant objected to the testimony, claiming that the answer given was beyond the scope of cross examination, and should not have been allowed. The Court denied the objection. Transcript, Vol. III, p. 712.

Plaintiffs continually tried to put before the jury their theory that Defendants had built the house and made a large profit, and this was somehow supposed to show that the house was defective. Because the court had denied the motion in limine regarding these bank records, they had been testified to, and Defendants unsuccessfully tried to keep them out of evidence, because the bank records were irrelevant to whether there were defects or now, who knew about them, and what it would cost to fix them. Transcript, Vol. II, page 275.

Plaintiffs asked a heating contractor to share his feelings that he had about the occupants of the house as he drove by the house in question. Over Defendant's objection, he was allowed to vent his "feelings". Transcript, Vol. II, pp. 342-43.

Plaintiffs called an architect as an expert witness. He was not an engineer. He testified during cross examination that he did not know whether a particular crack was structural (rather than cosmetic). Transcript, Vol. II, p. 436. Later, on redirect, Plaintiffs' attorney attempted to get into the record testimony that the crack might have been structural, and Defendants' attorney objected and ask that the testimony be stricken. Transcript, Vol. II, pp. 438 and 439. The objection was overruled. Id.

An important damage issue in the case was the quality and status of the plumbing in the house at issue. Plaintiffs called Chris Miller as their plumbing expert. The "expert" began reading off of a report prepared by someone else. Defendants' attorney objected to the reading of the notes as hearsay, and to his qualifications as an expert. Transcript, Vol. II, page 445, lines 21-22. The trial court agreed, and ask for further

foundation. Then, instead of offering any more testimony about his qualifications as an expert, the witness and Plaintiffs' attorney simply continued his testimony about the plumbing in the house. Later, Defendants` attorney again raises the issue of his qualifications as a plumber, as no further qualification testimony had been presented. Id. at 447. The judge then overrules the objection, and finds Mr. Miller qualified as an expert plumber. Id. at 447. It was brought out on cross-examination that Mr. Miller is not even a licensed plumber. Id. at 459.

A month or so before trial, Defendants Hatch had offered to purchase the subject house from the Plaintiffs for $463,000.00. It was not a settlement offer, and did not mention or reference the litigation at all. The Plaintiffs were claiming over $200,000 worth of damage, and would have had the opportunity to sell the house at a profit. The letter was sent certified mail to the Plaintiffs' house, and they refused not pick it up. It was also sent to Plaintiff John Covey, who did in fact receive it and give it to the other Plaintiffs. The judge would not allow this letter/offer into evidence. Transcript, Vol. I, pp. 129-133 (offer of proof).

The jury deliberated and returned with a verdict in favor of Defendant Hatch on the fraud claims, against Defendants Parkinson an in favor of Plaintiffs Michael and Elizabeth Morris in the amount of $42,220.00 on the breach of warranty claim, against Defendant Guy Hatch on the realtor claims in the amount of $9,279, and against Defendant Linda Hatch and in favor of Plaintiff John Covey in the amount of $5,000.00 based on the contract between them. See Verdict Form, Addendum, tab F.

Defendant brought timely motions for judgment JNOV, asking that the judgments against Defendants Hatch be set aside for insufficiency of the evidence, and that the judgment against the Parkinsons be set aside based on the caveat emptor and warranty arguments that had been made in the summary judgment and directed verdict motions by Defendants. These motions were denied. See Addendum, tab G (motion and denial order) .

Plaintiffs Morris requested an award of attorneys fees and costs based on the attorneys fees clause of the purchase and sale agreement. Defendants Parkinson claimed that the clause was abrogated at closing. The Court ruled that attorneys fees should be awarded, and then later, after submissions by the attorney for the Plaintiffs, awarded over $60,000 in attorney fees. Plaintiffs Morris only recovered $42,200 on their judgment for the breach of warranty. See Addendum, tabs D and E.

Defendants then filed this appeal.

SUMMARY OF ARGUMENTS

Issue No. 1: Should the Judge have granted Defendant's Motion for Partial Summary Judgment?

Plaintiffs admitted in various affidavits filed in this matter that they were aware of many of the defects in the house before they purchased the house. Plaintiffs have nonetheless asserted claims in tort and for breach of warranty regarding these same items that they knew about even as they chose to purchase the house. Utah case law supports Defendants' position that a construction warranty does not cover items that a buyer knows are defective, but rather items that later become defective.

Issue No. 2: Did the trial judge err in denying Defendants' Motion in Limine?

Defendant filed a lengthy motion in limine according to the schedule set forth in the scheduling order of the Court. The motion was denied in full. Some of the evidence was later excluded under rulings made at the time, in trial, but other evidence was allowed to come into evidence. The Defendant believe the Court erred, then, in two ways (1): by improperly denying the motion in limine before trial, the Court forced the Defendant to prepare for the cross examination of over 14 persons and entities, and (2) by allowing improper evidence to go before the jury.

Issue No. 3: Did the trial court err in failing to instruct the jury on (1) caveat emptor and (2) knowledge at the time of entering a warranty (Defendants' Proposed Instructions D-1 (later referred to as Instruction 37), and D-2 (later referred to as the warranty instruction))?

Defendants sought jury instructions on (1) caveat emptor, which is the law of the land on home purchasing, and (2) buyers' knowledge of defects as a bar to warranty claims, as set forth in the motion for partial summary judgment. Both were denied, so no instructions on these items were given. These arguments follow the same reasoning set forth in the motion in limine and requesting summary judgment.

Issue No. 4: Did the Court err in granting an award of attorneys fees to Plaintiff?

The trial court awarded over $60,000 in attorneys fees and costs based on the purchase and sale agreement. Defendants assert that the attorneys fees clause of the agreement (which is the only possible basis for the award of fees in this case) was

abrogated at closing, and that no language would allow that provision to survive closing. As such, no fees or costs should have been awarded. There are conflicting cases in this area, and Defendants rely on Utah Supreme Court cases such as Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) and Espinoza v. Safeco Title Insurance Co., 598 P.2d 346 (Utah 1979). Plaintiffs rely on recent (but contrary) Utah Court of Appeals cases.

Issue No. 5: Did the trial court err in the amount of attorneys fees and costs that it awarded to Plaintiffs?

Defendants believe that the court was far too generous in the amount of fees and costs it awarded to the Plaintiffs. For example, the court awarded almost $1000 for Plaintiffs' attorneys to bring a junior attorney down from Salt Lake City to Provo to read in a part of a deposition transcript.

Issue No. 6: Is the jury verdict awarding damages of $5,000 to John Covey against Linda Hatch supported by the evidence?

John Covey testified that he did not whether he had been damaged at all by Linda Hatch. If the Plaintiff does not know whether he has been injured, a verdict in favor of that Plaintiff is not supported by proper evidence.

Issue No. 7: Is the jury verdict awarding damages of $9,792.00 against Guy Hatch for real estate agency violations supported by the evidence?

Plaintiffs failed to prove the amount of damages they suffered from any alleged real estate agency violations, and thus the jury could only have been speculating. The best evidence obtained by Plaintiff was that the witness didn't recall how much he

received for his commission.

Issue No. 8: Did the trial err in denying Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial?

Defendants moved for a directed verdict during trial, and for judgment notwithstanding the verdict after the trial (or in the alternative, for a new trial on certain matters) based on (1) the issues of insufficient evidence as set forth in Issues 6 and 7, above; (2) the issue of caveat emptor (as set forth above, and as set forth in detail in accompanying memorandum). This relates to issues 6 and 7, above, and as set forth in the motions and accompanying memoranda.

Issue No. 9: Did the trial court err in not allowing Defendant Guy Hatch to testify about whether the winter when they had resided in the house was cold or whether there was snow on the ground?

A key issue in this case was the condition and adequacy of the heating system of the house in question. Defendants had lived in the house through at least one winter. The trial court sustained an objection which prohibited Mr. Hatch to testify as to whether it was a cold winter or not. This was relevant and probative, and had not been testified to before by Mr. Hatch.

Issue No. 10: Did the trial court err in not allowing Exhibit 56 E, an enlargement of a picture offered and entered by Plaintiffs, to be admitted into evidence by Defendants?

In this instance, no objection was even made by the Plaintiffs, yet the trial judge

"sustained the duplicative objection". The picture would have allowed the jury to better see the details in this picture. This was a case where hundreds of photographic exhibits (including other enlargements) were entered. The judge had no basis to disallow this picture, especially when no objection was raised.

Issue No. 11: Did the trial court err in not allowing Defendants re-direct examination of Guy Hatch?

During trial, the Plaintiffs' attorney had just finished a 20 question re-cross of the witness. Defendants' attorney stood and ask for re-direct, and was denied the opportunity. This violates every tenant of fairness and was uncalled for, but followed the patter of prejudice against the Defendants.

Issue No. 12: Did the trial court err in not allowing Mr. Hatch to testify as to his personal observations of the clothing his children wore in the allegedly cold basement?

During the trial, the court sustained a "duplicative" objection when Mr. Hatch tried to testify about what his children wore in the allegedly cold basement. Mr. Hatch had not previously testified on this subject, and it was thus not duplicative.

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Plaintiffs for the first time at trial testified of "cold wind" blowing through alleged cracks int the house. Defendant then found a rebuttal (and impeachment) exhibit, a video of the very room in question, on a snowy, cold Christmas morning. The trial court sustained Plaintiff's objection to this piece of evidence which completely devastated and

contradicted their story that cold wind blew through the house. The evidence was relevant and probative, and proper rebuttal/impeachment evidence

Issue No. 14: Did the trial court err in allowing Plaintiff to ask questions on redirect outside the scope of cross examination?

During trial, Plaintiff Michael Morris is being examined on re-direct. He is asked about a certificate of occupancy, which was not brought up during either direct or cross examination. Thus, the answer given was beyond the scope of cross examination, and should not have been allowed.

Issue No. 15: Did the trial court err in allowing the complete bank records relating to the draws on the construction account to be entered in evidence?

Plaintiffs continually tried to put before the jury their theory that Defendants had built the house and made a large profit, and this was somehow supposed to show that the house was defective. Because the court had denied the motion in limine regarding these bank records, they had been testified to, and Defendants tried to keep them out of evidence, because the bank records were irrelevant to whether there were defects or now, who knew about them, and what it would cost to fix them. This objection should have been sustained.

Issue No. 16: Did the trial court err in allowing the heating contractor who installed the HVAC system in the house at issue in the lawsuit testify about his "feelings about the occupant of the home as [he] drove by"?

Plaintiffs asked the contractor to share his feelings that he had about the occupants

of the house as he drove by the house in question. His feelings were highly prejudicial, and totally irrelevant.

Issue No. 17: Did the trial court err in allowing Plaintiff's architectural expert to testify about the nature of the crack in the turret?

Plaintiffs called an architect as an expert witness. He was not an engineer. He testified during cross examination that he did not know whether a particular crack was structural (rather than cosmetic). Later, on redirect, Plaintiffs' attorney attempted to get into the record testimony that the crack might have been structural, and Defendants' attorney objected and ask that the testimony be stricken. The objection was denied, and the testimony was allowed.

Issue No. 18: Did the trial court err in allowing Christopher Miller to render expert plumbing testimony?

Plaintiffs called Chris Miller as their plumbing expert. The "expert" began reading off of a report prepared by someone else. Defendants' attorney objected to the reading of the notes as hearsay, and to his qualifications as an expert. The trial court agreed, and ask for further foundation. Then, instead of offering any more testimony about his qualifications as an expert, the witness and Plaintiffs' attorney simply continued his testimony about the plumbing in the house. Defendants' attorney again later raised the issue of his qualifications as a plumbing expert. The judge then overruled the objection, and finds Mr. Miller qualified as an expert plumber. Mr. Miller is not even a licensed plumber. He should not have been qualified as an expert plumber, and his testimony

should not have been allowed.

Issue No. 19: Did the court err in prohibiting the introduction of the Hatch offer to purchase the house before trial for $463,000.00?

A month or so before trial, Defendants Hatch offered to purchase the subject house from the Plaintiffs for $463,000.00. It was not a settlement offer, and did not mention or reference the litigation at all. The Plaintiffs were claiming over $200,000 worth of damage, and would have had the opportunity to sell the house at a profit. The judge would not allow this letter/offer into evidence. Defendants contend that the offer was highly relevant.

Issue No. 20: Did the cumulative effect of all the above-cited errors create a situation where a fair trial could not and did not take place before the trial court?

Even if some or even all of the errors alleged in this brief are harmless, their cumulative effect was to render it impossible for the Defendants to have a fair trial. Some of the alleged errors are more important than others, but added together, there was clearly a bias against the Defendants that implicated fairness and due process.

ARGUMENT

Issue No. 1: Should the Judge have granted Defendant's Motion for Partial Summary Judgment?[13]

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[13]Because the appellate court looks at this portion of the appeal in the same position as the trial court (i.e. based on the affidavits submitted before trial, and not in light of any trial evidence), Appellant hereby incorporates by reference all affidavits and briefing done in conjunction with the summary judgment motion.

I. PLAINTIFFS' CLAIMS WHICH ARE NOT COVERED BY THE WARRANTIES CONTAINED IN THE AGREEMENT ARE EXPRESSLY PRECLUDED BY THE ABROGATION CLAUSE OF THE AGREEMENT AND THE DOCTRINE OF MERGER.

The Morris' claims for breach of contract necessarily rely on the Agreement between the parties and the Warranties contained therein. Claims relating to conditions of the Property that do not relate to habitability or workmanship of the Property or any other item expressly covered by the Warranties are abrogated and merged into the deed. The abrogation clause of the Agreement itself and Utah case law firmly establish this point. Schafir v. Harrigan, 879 P.2d 1384, 1392 (Utah App. 1994). This includes any alleged building code violations. Id.

A. The Warranties Contained in the Agreement are Unambiguous and Are Therefore Interpreted as a Matter of Law.

Interpretation of an unambiguous contract is a matter of law. In R&R Energies v. Mother Earth Industries, Inc., the Utah Supreme Court held that "the interpretation of a contract is a matter of law for the court to determine unless the contract is ambiguous . . ." R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1074 (Utah 1997). The Court continued by pointing out that "[l]anguage in a contract is "ambiguous" when it is reasonably capable of being understood in more than one sense." Id. Because the warranty terms of the Agreement in the present case are clearly stated and unambiguous, the warranties are to be interpreted by the Court as a matter of law. Furthermore, inasmuch as the Addendum warranty provision was drafted by Plaintiffs, it will be construed against them.

B. The Items Set Forth in Defendants' Statement of Undisputed Facts Are Outside of Express Coverage of the Warranties.

As set forth in the Statement of Facts above, certain alleged defects claimed by Plaintiffs were indisputably known prior to the closing. The Buyers both admit that they viewed and inspected the Property on several occasions and hired an inspector to thoroughly inspect the Property. They noted the alleged defects set forth above and did not include such items in the Warranties. They cannot rely on any other alleged warranty or representation inasmuch as the Agreement constitutes the entire agreement between the parties. (Exhibit 1, ¶ 14.) Therefore, Plaintiffs cannot recover under breach of contract for the items set forth in the Statement of Facts.

II. ALLEGED DEFECTS THAT WERE KNOWN OR DISCOVERABLE BY BUYERS ARE BARRED BY THE AGREEMENT AND THE DOCTRINE OF CAVEAT EMPTOR.

Alleged defects that were known or discoverable by Buyers are barred by the Agreement itself and the doctrine of *caveat emptor*. Utah courts apply the common law doctrine of caveat emptor to purchases of existing, previously used homes. Indeed, the clear majority of courts nation-wide have deemed it reasonable to hold the purchaser to the caveat emptor doctrine in the purchase of used housing. See Utah State Medical Assoc. v. Utah State Employees Credit Union, 655 P.2d 643, 645 (Utah, 1982) (the doctrine of caveat emptor prevails in the sale of used property). The courts have reasoned that because the parties know the article is not new, and the buyer has an opportunity to inspect the article, he is placed on the alert for defects which might affect the article's

quality, condition or fitness. Id.

Thus, the warranties in the Agreement do not extend to alleged defects that were known or discoverable by Michael and Elizabeth Morris (the "Buyers") at the time the Agreement was entered into. The items known or discoverable by Plaintiffs are set forth in the Statement of Undisputed Facts filed with the summary judgment materials.

Issue No. 2: Did the trial judge err in denying Defendants' Motion in Limine?

Defendant filed a lengthy motion in limine according to the schedule set forth in the scheduling order of the Court. The motion was denied in full. Some of the evidence was later excluded under rulings made at the time, in trial, but other evidence was allowed to come into evidence. The Defendant believe the Court erred, then, in two ways (1): by improperly denying the motion in limine before trial, the Court forced the Defendant to prepare for the cross examination of over 14 persons and entities, and (2) by allowing improper evidence to go before the jury.

Defendants specifically feel that the failure to grant subsections I(A) and I(B) were error, as far as the witnesses are concerned. Plaintiffs had identified a number of witnesses who could not offer any relevant testimony. They were primarily people who had previously had disputes with Mr. Hatch, bitter former business partners, etc. They clearly had no facts relevant to this case. The court did not grant the motion, and instead caused the Defendant to deal with the possibility of their testimony, and to have to prepare witnesses to counteract them, all the way through the trial. Although the witnesses did not testify, the time and effort that were expended as a result of this motion

in limine not being granted was very harmful to Defendants.

Defendants specifically feel that the failure to grant subsections II(D), II(F), II(G), II(I), and II(J) were erroneous.

In part II(D) of the motion in limine, the Defendants asked the Court to preclude any character evidence relating to the Defendants, because such evidence is generally inadmissible. URE 404, 608(a)(b). This opened the door for Plaintiffs' attorney to delve into areas that he should not have been allowed to. There was no evidence presented which would have allowed negative character evidence or "prior bad acts" to come into evidence.

In parts II(F) and (G) of the motion in limine, Defendants asked the Court to limit the financial testimony regarding overall profit and loss on the house (as opposed to the cost of any particular item), and to limit the testimony of unhappy sub-contractor who were paid late. Both of these areas of testimony were clearly irrelevant, and potentially prejudicial as well. URE 401, 403.

In parts II(I) and II(J), Defendants sought to eliminate testimony about defects that Plaintiffs were aware of when they purchased the house, as well as items for which Defendants had no responsibility, that were discovered after the two year warranty period had expired. The arguments here are based on the same law and reasoning presented on Issue 1, above. Since the Plaintiffs were not entitled to recover for these items, this testimony would be irrelevant, and the motion in limine should thus have been granted.

Issue No. 3: Did the trial court err in failing to instruct the jury on (1) caveat

emptor and (2) knowledge at the time of entering a warranty (Defendants' Proposed Instructions D-1 (later referred to as Instruction 37), and D-2 (later referred to as the warranty instruction))?

As set forth in the argument on Issue 1, caveat emptor applies in all Utah real estate cases. Furthermore, as set forth in Issue 1 above, when a party knows about particular defects, a warranty will not "retroactively" cover them.

Defendants proposed two jury instructions (found in the Addendum under tab "C") dealing with these areas that were rejected by the trial court. They were extremely important, and were part of the heart of Defendants' defense. They should have been given to the jury, and it was reversible error not to provide these instructions of basic Utah law.

Issue No. 4: Did the Court err in granting an award of attorneys fees to Plaintiff?

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEY'S FEES OR COSTS UNDER THE REAL ESTATE PURCHASE AGREEMENT.

A. The Attorney's Fees Provision in the Real Estate Purchase Agreement was Abrogated and Does Not Apply to this Action.

The trial court grossly misinterpreted Utah law as it relates to the abrogation of attorney's fees provisions in preliminary real estate agreements. The trial court adopted an erroneous of interpretation of this Court's opinion in Maynard v. Wharton proffered by Plaintiffs and concluded that Plaintiffs were entitled to their attorney's fees. As shown in this section, under applicable Utah law, the attorney's fee provision in this case was clearly abrogated.

"In Utah, attorney fees are awardable only if authorized by statute or by contract. [Citations omitted.] If provided for by contract, the award of attorney fees is allowed only in accordance with the contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988).

In this case, the requirements of Dixie State Bank are not met. Although the parties' Real Estate Purchase Contract ("REPC," Plaintiffs' Exhibit 1 at trial) contains an attorney's fees provision in paragraph 17, the express terms of that provision when read in connection with an abrogation provision in the REPC prohibit an award of such costs and fees in this case. The abrogation provision states, "Except for the express warranties made in this Contract, the provisions of this Contract shall not apply after closing." (REPC, ¶ 19 (emphasis added).)

According to the plain meaning of paragraph 19 of the REPC, the only provisions of the REPC that apply after closing are "the express warranties made in the Contract." The costs and attorney's fees provision is not an express warranty made in the REPC, and, therefore it does not apply to actions brought after closing. Because attorney's fees are allowed "only in accordance with the contract," Dixie State Bank, 764 P.2d at 988, and because the REPC does not accord Plaintiffs their attorney's fees after closing, there is no legally cognizable basis for Plaintiffs' motion for attorneys fees.

The Utah Supreme Court addressed this exact issue under an almost identical contractual and factual scenario in Espinoza v. Safeco Title Insurance Co., 598 P.2d 346 (Utah 1979). In Espinoza, the plaintiffs purchased real property from the defendants and

subsequently brought an action against the defendants and a title company for breach of a warranty against encumbrances. The encumbrance was cleared and the defendants moved for summary judgment. The plaintiffs acknowledged the encumbrance had been cleared but claimed entitlement to attorney's fees in connection with bringing their breach of warranty action. Id. at 347. The trial court denied the plaintiffs' claim for attorney fees and the plaintiffs appealed.

The Utah Supreme Court affirmed the trial court and held that:

> Plaintiffs contend that [defendants] breached the Earnest Money Agreement initially entered into between plaintiffs and [defendants] by reason of their failure to convey a clear title. The agreement provides that a defaulting party is liable for costs of enforcing the agreement, including reasonable attorney's fees. But the agreement contains the standard clause by which it became abrogated by execution and delivery of the final agreement, that is, the deed and policy of title insurance.
>
> Attorney's fees are not chargeable to an opposing party generally unless there is contractual or statutory liability therefor. There is neither here. The terms of the Earnest Money Agreement were merged into the deed and extinguished upon delivery thereof. Though the deed contains warranties against encumbrances, it does not provide for the payment of attorney's fees in an action for damages upon breach of the warranties.

Id. at 348 (emphasis added).

The Utah Supreme Court's holding in Espinoza reiterates its holding in a previous case, Kelsey v. Hansen, 419 P.2d 198 (Utah 1966). In Kelsey, the Court held that a provision in an earnest money agreement requiring the buyer to pay extra money for drapes in a fourplex was extinguished where the earnest money agreement stated that "it is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt." Id. at 198.

Espinoza and Kelsey are controlling with respect to this case. In this case (as in Espinoza and Kelsey), the parties' agreements contain warranties or promises that survive closing, an attorney's fees provision and a standard abrogation clause. Also in this case (as in Espinoza and Kelsey), a cause of action for breach of warranty or other promise was available to Plaintiffs. Under such facts, the REPC in this case "does not provide for payment of attorney's fees in an action for damages upon breach of the warranties" Id.[14] Therefore, Plaintiffs' motion for attorney's fees must be denied in its entirety.[15] And, for the same reasons, Plaintiffs' motion for costs under the REPC must also be denied in its entirety.

Plaintiffs may argue that a contrary result is reached in Stubbs v. Hemmert, 576 P.2d 168 (Utah 1977) and Maynard v. Wharton, 912 P.2d 446 (Utah App. 1996). However, both cases are clearly distinguishable from this case and entirely consistent with the holdings in Espinoza and Kelsey. In fact, Stubbs actually supports Defendants' claim that the attorney's fee provision is abrogated. In Stubbs, the Utah Supreme Court held that the doctrine of merger did not extinguish the right of a buyer to claim damages

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[14] The holding in Espinoza with respect to the effect of an abrogation clause on attorney's fees has been followed in Barnhardt v. Gold Run, Inc., 843 P.2d 545 (Wash App. 1993). The Utah Supreme Court has also recognized the same principle in similar circumstances. See Petty Motor Lease, Inc. v. Jolley, 385 P.2d 782, 783 (Utah 1978) (where a contract of sale replaced a lease agreement, the lease agreement and an attorney's fee provision therein had no more force or effect).

[15] Plaintiffs allege no other basis for the recovery of attorney's fees and admit that only the fees attributable to breach of the REPC are recoverable. (See Plaintiffs' Affidavit for Attorney's Fees and Costs).

for a seller's wrongful removal of certain fixtures from the property. Id. at 169-70. The Court found that the parties' agreement prohibiting the seller from removing certain fixtures survived the delivery of the deed to the buyer because it was clear from the agreement that the parties intended the prohibition against removal of fixtures to survive after delivery of the deed. Id.

However, the Court, citing to Kelsey v. Hansen, stated that if there was "manifest intent to the contrary," that the manifest contrary intent would control. The manifest contrary intent in Kelsey was the abrogation provision similar to the one in this case. The Stubbs Court noted that the existence of an abrogation provision will extinguish a collateral act that may otherwise survive under the doctrine of merger. Id. at 170, n. 4.

In its holding in Maynard, this Court did not address the issue of awarding attorney's fees where there is an abrogation provision in a real estate contract because it determined that there was no breach of contract and, therefore, no attorney's fees could be awarded. Id. at 452. In *dicta*, however, this Court stated that attorney fees may be awarded for breach of an "explicit covenant or agreement contained in the earnest money agreement." Id. The Maynard dicta is not applicable in the present case for two reasons: First, it is *dicta*, and second, Maynard does not apply abrogation clauses, or the merger doctrine, or its exceptions, to attorney's fees provisions.

Maynard does state (twice) that the merger doctrine "is a contractual statement of the common law doctrine of merger." Id. at 450 and 451. However, Maynard does *not* say that an abrogation clause is a contractual statement of the *exceptions* to the doctrine

of merger. And wisely so, because such a claim would fly in the face of Utah law as set forth in Espinoza, Kelsey, and this Court's own holding in Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994).

In Schafir, this Court held that an abrogation clause (which did not exclude any express warranties) served to extinguish the liability of the seller for breach of a warranty regarding building code violations. Obviously, such a warranty is a collateral matter to the vesting of title and, therefore, would not be extinguished by the merger doctrine or the abrogation clause in that case (if, in fact, the abrogation clause is a contractual statement of the *exceptions* to the merger doctrine). However, in Schafir, this Court found that such a collateral matter *did not survive*--and could not be the basis for a breach of warranty claim--because of the abrogation clause in the parties' earnest money agreement. Id. at 1392.

Furthermore, to claim that an abrogation clause is a contractual statement of the *exceptions* to the merger doctrine would violate the most basic principle of contract interpretation; that a contract must be interpreted to reflect the intentions of the parties as set forth in the plain language of the contract. Hall v. Process Instruments and Control, Inc., 866 P.2d 604, 605 (Utah App. 1993). "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991). The abrogation clause in the REPC (and in most other contracts) says nothing about exceptions to abrogation based on the merger doctrine. It is clear the parties never contemplated or

intended that such exceptions should be applied to the abrogation clause in the REPC. The abrogation clause means exactly what it says: "Except for express warranties made in this Contract, the provisions of this Contract shall not apply after Closing."

Therefore, although Plaintiffs' claim for breach of warranty may survive, their right to attorney's fees does not. For these reasons, this Court should reverse the trial court's ruling that Plaintiffs are entitled to their reasonable attorney's fees under the REPC.

B. Under the Express Terms of the Attorney's Fees Provision, Plaintiffs Are Not Entitled to Attorney's Fees Where There Are No Attorney's Fees.

Under the facts of this case, Plaintiffs' claim for attorney's fees is barred by the terms of the attorney's fees provision itself. In this case--as Plaintiffs admit--they are paying no attorney's fees. (Affidavit of Mark Morris, pp. 2-3.) Plaintiffs' attorney has agreed to represent them for free and will only claim attorney's fees if they are recovered pursuant to the REPC. Plaintiffs have claimed that the Court should not consider this fact in connection with an award of attorney's fees and cite Barker v. Utah Public Serv. Comm., 970 P.2d 702 (Utah 1998) as support for that claim.

Plaintiffs' use of Barker is terribly misplaced. Actually, the rationale given in *Barker* for awarding attorney's fees in *pro bono* cases strongly suggests that Plaintiffs' attorney's fees should be completely disallowed in this case. The rationale for awarding fees in Barker was based on federal civil rights statutes which encourage meritorious claims against civil rights violators that otherwise might not be brought. In Barker,

although civil rights were not involved, an award of fees for the pro bono work was allowed in order to "encourage the kind of public service performed" by the attorneys in that type of case (which involved overcharging by U.S. West to its ratepayers). Id. at 8.

It is improper to equate the public policy considerations that exist in civil rights cases, and in Barker, with the facts of this case. In this case, defendants (who were apparently able to afford a $410,000 house), undoubtedly could have paid for an attorney. However, as the results of this case indicate, Plaintiffs' claims were so weak that they only recovered $42,000 of approximately $200,000 claimed. The amount awarded Plaintiffs is only $12,000 more than the offer of judgment given to Defendants more than three and a half months before trial (Affidavit of Stephen Quesenberry p.2). The only reason Plaintiffs were willing to expend over $50,000 in attorney hours billed in order to recover the extra $12,000 was because they knew they did not have to pay for it. It is highly unlikely that Defendants would have expended this amount if they had been obligated to actually pay $50,000 in attorney's fees. In other words, Defendants' fee agreement in this case fostered inefficient litigation of a weak case. If the fee agreement in this case is to be considered at all, it should be considered as a factor warranting elimination of attorney's fees.

Apart from policy considerations, Barker is completely irrelevant to this case. In this case, the REPC, is the controlling basis for attorney's fees, not the civil rights statutes or common fund theories at issue in Barker. As set forth above, there can be no recovery under the REPC because it is expressly abrogated. However, even if it were not

abrogated, the REPC clearly states that a prevailing party is entitled to "reasonable attorney fees." By Plaintiffs' own admission, they have no attorney's fees at all (much less any reasonable fees)., and, therefore, they are entitled to nothing under the REPC. The REPC entitles only Plaintiffs to attorney fees, not Plaintiffs' attorney to attorney fees.

Issue No. 5: Did the trial court err in the amount of attorneys fees and costs that it awarded to Plaintiffs?

Plaintiffs claim attorneys fees and costs of over $60,000 for this case. On their claims for which attorneys fees (under their theory) are recoverable, they only obtained a verdict for $42,200.00. Furthermore, the work was not even done on a billable basis, but was donated by a brother to his brother.

Plaintiffs' claimed costs and attorney's fees are not reasonable under the factors identified by Utah courts, as set forth in cases such as Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 173 (Utah App. 1990). Instead, and in light of the relevant factors, Plaintiffs' claimed attorneys fees should be significantly reduced.

The amount of work necessary to adequately prosecute this matter is shown by comparing the amount of attorneys fee billed by Defendants' attorney ($27,806.00 to defend all claims including fraud, etc.), to the $55,000 awarded to Plaintiff for prosecuting just one claim (breach of warranty). This disparity alone shows that the fees awarded were unreasonable. Richard Barton Enter., Inc. v. Tsern, 928 P. 2d 368, 381 (Utah 1996). The issues in this case were not difficult or novel. The matter was

performed for a family member and for which counsel was willing, if necessary, to perform without compensation. This case thus did not preclude employment by other clients. Defendants' attorney charged more than is reasonable and normal in Utah County. In the end, Defendants obtained just $12,000 more in this case than the $30,000 offer of judgment that Defendants offered before trial, and in total only recovered one quarter of what their claimed damages were. This Court must decide if spending $55,000 in fees to obtain an additional $12,000 is reasonable. For these reasons, as well as the other Brown factors, the fee award must be reduced to an appropriate amount.

Issue No. 6: Is the jury verdict awarding damages of $5000 to John Covey against Linda Hatch supported by the evidence?

At trial, the jury awarded Plaintiff, John Covey, $5,000.00 in damages despite the complete lack of any evidence suggesting that Mr. Covey had suffered any damages. In fact, John Covey testified that he had no idea if any of the items in his contract had or had not been completed by Linda Hatch. Transcript, Vol. I, p. 56-57. He testified that he did not know if he had been damaged by the Defendants. Id.

In order to warrant an award of damages, a plaintiff must prove:

"First, [the plaintiff] must prove the fact of damages. The evidence must do more than merely give rise to speculation that damages in fact occurred; it must give rise to a reasonable probability that the plaintiff suffered damage as result of a breach. Second, the plaintiff must prove the amount of damages. The level of persuasiveness required to establish the *fact* of loss is generally higher than that required to establish the *amount* of a loss."

Atkin Wright & Miles v. Mountain States Telephone and Telegraph Co., 709 P.2d 330,

336 (Utah 1985). In Atkin Wright the Utah Supreme Court reversed the trial court's award of lost income to the plaintiff because the proof offered by the plaintiff of lost gross income was an insufficient foundation to support an award of lost net income. Id.

Here, there was not even an attempt made by Mr. Covey to present evidence which might prove the fact that he had damaged as a result of the Defendant's actions. Obviously, if there is no evidence to show that Mr. Covey did, in fact, suffer damages there was no basis for determining the amount of damages suffered by Mr. Covey.

The jury clearly erred in awarding damages to Mr. Covey and accordingly the award should be reversed on appeal.

Issue No. 7: Is the jury verdict awarding damages of $9,792.00 against Guy Hatch for real estate agency violations supported by the evidence?

At trial, the jury awarded Plaintiffs damages in the amount of $9,792.00 against Guy Hatch for real estate agency violations. Defendants request that this award be reversed as Plaintiffs presented absolutely no evidence upon which the amount of these damages could be calculated. At best, the only witness questioned about this issue (Guy Hatch) stated that he could not recall what he had been paid for his commission.

Although some degree of uncertainty in the amount of damages is acceptable once the fact of damages has been established, an award of damages based only on speculation cannot be upheld. Sampson v. Richins, 770 P.2d 998, 1007 (Utah App. 1989). "The amount of damages may be based on approximations if, the fact of damages is established, and the approximations are based upon reasonable assumptions or

projections." Atkin Wright, supra, at 336.

At trial, Plaintiffs failed to proffer any reasonable assumptions or projections as to the amount of damages resulting from Guy Hatch's alleged real estate agency violations. Accordingly, the amount of these damages are necessarily speculative and cannot be upheld on appeal.

Issue No. 8: Did the trial err in denying Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, For a New Trial?

Defendants are entitled to judgment as matter of law as to all damages awarded for alleged defects in the house which Plaintiffs knew about before purchasing the house. As set forth in the Memorandum in Support of Defendants' Motion for Partial Summary Judgment previously submitted to the Court (discussed above):

> "Plaintiffs' claims for breach of contract necessarily rely on the Agreement between the parties and the Warranties contained therein. Claims relating to conditions of the Property that do not relate to habitability or workmanship of the Property or any other item expressly covered by the Warranties are abrogated and merged into the deed The abrogation clause of the Agreement itself and Utah case law firmly establish this point. Schafir v. Harrigan, 879 P.2d 1384, 1392 (Utah App. 1994). This includes any alleged building code violations. *Id.*
>
> . . .
>
> Because the warranty terms of the Agreement in the present case are clearly stated and unambiguous, the warranties are to be interpreted by the Court as a matter of law. Furthermore, inasmuch as the Addendum warranty provision was drafted by Plaintiffs, it will be construed against them.
>
> . . .
>
> [The evidence showed that] certain alleged defects claimed by Plaintiffs were indisputably known prior to the closing. The Buyers both admit that they viewed and inspected the Property on several occasions and hired an inspector to thoroughly inspect the Property. They noted the alleged defects set forth above and did not include such items in the

> Warranties. They cannot rely on any other alleged warranty or representation inasmuch as the Agreement constitutes the entire agreement between the parties. (Agreement, ¶ 14.) Therefore, Plaintiffs cannot recover under breach of contract for [items which they knew about prior to purchasing the house]."

(Memorandum in Support of Defendants' Motion for Partial Summary Judgment, 6-7.)

Issue No. 9: Did the trial court err in not allowing Defendant Guy Hatch to testify about whether the winter when they had resided in the house was cold or whether there was snow on the ground?

Fundamental fairness requires that a party be permitted to introduce evidence to rebut inferences the jury can draw from the opposing party's evidence. Astill v. Clark, 956 P.2d 1081, 1087 (Utah App. 1998). One of the main issues in this case was the condition and adequacy of the heating system in the house. During Plaintiffs' case in chief, they testified that the house was freezing in the winter; this was one of their largest complaints.

Defendants lived in the house in question during the winter of 1994. In order to refute Plaintiffs' testimony about the adequacy of the heating system in the house and the temperature inside, Defendants sought to testify that the winter they spent in the house was cold and snowy, yet they had been very comfortable walking around in T-Shirts and shorts. The trial court denied Defendant's this opportunity (Trial Transcript, Vol. IV, pp. 933 (line 25) to 934 (lines 1-4). The trial court's decision to exclude this testimony was an abuse of discretion which should be reversed on appeal.

Issue No. 10: Did the trial court err in not allowing Exhibit 56 E, an enlargement

of a picture offered and entered by Plaintiffs, to be admitted into evidence by Defendants?

At trial dozens of photographs depicting the home in question were entered into evidence. One of these photographs was offered to show a "negative slope" on the property. During their case in chief, Defendants attempted to offer into evidence an enlargement of Plaintiffs' photograph (Exhibit 56 E) which provides greater detail and rebuts Plaintiffs' claim of the negative slope. Plaintiffs' counsel stated "It is duplicative, your Honor; but I don't have any objection." To which the trial court responded, "I sustain the duplicative objection." (Trial Transcript, Vol. IV, p. 944, lines 7-14). The trial court refused to enter admit the enlargement into evidence.

Utah courts have held that photographs cannot be excluded as being duplicative if the photographs in question clarify, rebut or depict more clearly issues placed before the fact finder. In State v. Betha, 957 P.2d 611 (Utah App. 1998), the trial court's decision to admit various photographs depicting the victims wound's caused by the defendant's assault was affirmed over the defendant's cumulative evidence objection. The Betha Court stated "...the photos are not duplicative of one another...the challenged photos more clearly show the extent of [the victim's] injuries than [other admitted photos]." See also Van Dyke v. Ogden Savings Bank, 161 P. 50, 53 (Utah 1919) ("[T]he enlarged signatures make much clearer the characteristics and peculiarities of the signatures that are in dispute, and therefore make clear that which, without them, was obscure and extremely doubtful.")

Similarly, in the instant case, the enlarged photograph which Defendants sought to admit into evidence, made much clearer the characteristics and details of the alleged defect. Accordingly, the enlargement of the photo was not cumulative and the court abused its discretion in not admitting the enlarged photograph.

Issue No. 11: Did the trial court err in not allowing Defendants re-direct examination of Guy Hatch?

At Vol. IV, p. 999, line 21 of the Trial Transcript, Plaintiffs' counsel completed an approximately 20 question re-cross examination of Defendant, Guy Hatch. This cross-examination concerned the compensation received by Defendants for their efforts in constructing the house. This was a key issue of Plaintiffs' case. At the completion of the re-cross examination, Defense counsel requested to ask one last question of Mr. Hatch but was denied by the Trial Court.

A party on redirect examination should be able to explain answers to questions asked on cross-examination. King v. Barron, 770 P.2d 975, 979 (Utah 1988). Here, after the re-cross examination of Mr. Hatch, the jury was left with the impression that Defendants had taken excess compensation for the construction of the house bolstering Plaintiffs' theory that not enough money had been spent on the materials and craftsmanship in building the house resulting in defects. It is clear from the exchange between Mr. Hatch and Plaintiffs' counsel that Mr. Hatch was confused by the questions presented him. Defense counsel wanted to clarify any confusion and correct any misleading inferences. It was an abuse of discretion and harmful the Defendants' case to

not allow one question on redirect examination after a lengthy cross-examination.

Issue No. 12: Did the trial court err in not allowing Mr. Hatch to testify as to his personal observations of the clothing his children wore in the allegedly cold basement?

Defendants attempted to introduce testimony from Linda Hatch, confirming her husband's testimony that their children were comfortable sleeping in T-Shirts and shorts in the basement of the house during the winter. The trial court sustained Plaintiffs' duplicative objection, denying Mrs. Hatch the opportunity to testify on this issue. (Trial Transcript, Vol. IV, pp. 1016 (lines 20-25) and 1017 (line 1).

Mrs. Hatch had not previously testified regarding her children's sleeping attire in the basement and accordingly, the Trial Court abused its discretion in sustaining Plaintiffs' duplicative objection. Mr. Hatch had testified regarding the children's clothing in the basement of the house, however, since the adequacy of the heating system in the house was a major issue of Plaintiffs' case, Defendants should have been allowed to have more than one person testify as to the temperature and conditions in the basement during the winter.

Issue No. 13: Did the trial court err in excluding Exhibit 66, a video demonstrating that the house was not cold?

The trial court's evidentiary rulings are reviewed under an abuse of discretion standard. State v. Hamilton, 827 P.2d 232, 239 (Utah 1992). However, the trial court's conclusions of law should be reviewed for correctness. The trial court's ruling under Utah Rule of Evidence 403 that proffered evidence's prejudicial effect outweighed its

probative value is a conclusion of law. State v. Betha, 957 P.2d 611, 614 (Utah App. 1998).

For the first time at trial, Plaintiffs testified of a "cold wind" blowing through alleged cracks in the house. Plaintiff, Liz Morris testified that she could "feel the wind blowing" inside the house and that the "basement was freezing cold." (Transcript, Vol. I p. 80, lines 13-20). She later testified that "I like to live in a home where the wind doesn't blow through the walls." (Transcript, Vol I, p. 140, lines 12-13).

Plaintiffs' claims in this regard were not reasonably anticipated as it was brought up for the first time at trial. Defendants argued that Plaintiffs' claims regarding wind blowing through the house and freezing temperature inside during the winter was grossly exaggerated. In support of their argument, Defendants located a video tape depicting the Defendants and their family in the very room in question on a cold, snowy Christmas morning. In the video, Defendants and their children can be seen walking around with bare feet, in thin pajamas and wearing shorts. This clearly refutes and impeaches Plaintiffs' testimony that during the winter, cold wind blew through alleged cracks in the walls making the basement freezing.

Plaintiffs objected to the video because it was not disclosed by Defendants prior to trial and that its probative value is outweighed by its prejudicial effect. (Transcript, Vol. III, p. 626.) The trial court sustained Plaintiffs' objections after hearing argument from both sides and viewing the video tape. (Trial Transcript, Vol. III, pp. 629-630).

If the party seeking to admit the undisclosed evidence could not have reasonably

anticipated, before trial, that the evidence would be necessary to rebut a claim of the opposing party, the evidence should be admitted. Turner v. Nelson, 872 P.2d 1021 (Utah 1994). Here, at no time prior to trial during discovery, did Plaintiffs make the claim that there was wind blowing through the house. The first time Defendants were aware of this claim was during Liz Morris' testimony on the first day of trial. Therefore, there was no way Defendants could have reasonably anticipated this claim from Plaintiffs and the trial court abused its discretion in excluding the video tape on this ground.

Fundamental fairness requires that a party be permitted to introduce evidence to rebut inferences the jury can draw from the opposing party's evidence. Astill v. Clark, 956 P.2d 1081, 1087 (Utah App. 1998). Here, the video tape was highly probative as it depicted the exact room in question, during the winter time with Defendants and their children walking around very comfortable in thin pajamas and shorts. This directly rebuts Liz Morris' testimony that the room was "freezing" and had a "cold wind blowing through it." Whatever slight prejudicial effect the video might have because the jury would see Defendant's children is clearly outweighed by the high probative value of the tape. The trial court erred in excluding this video tape and accordingly should be reversed.

Issue No. 14: Did the trial court err in allowing Plaintiff to ask questions on redirect outside the scope of cross examination?

In Vol. III, p. 712, lines 12-18 of the trial transcript, Plaintiff, Michael Morris is being examined on re-direct. He is asked whether Defendants ever told him there was no

certificate of occupancy issued on the house. The issuance of a certificate of occupancy on the house was never brought up on direct examination of Mr. Morris nor during his cross-examination.

The scope of re-direct examination is limited to the field covered during cross-examination. State v. Cooper, 201 P.2d 764, 768 (Utah 1949). "Even testimony which may have some slight weight or tendency to rebut the inferences raised on cross–examination may not be admitted if it is too remote, or collateral to the principal inquiry." Id.

Here, Mr. Morris' testimony regarding the certificate of occupancy on the house didn't even have "slight weight or tendency to rebut the inferences raised on cross-examination" because the issue was never raised before. Yet the court erroneously overruled Defendants' objection. The court's error was an abuse of discretion which should be reversed on appeal.

Issue No. 15: Did the trial court err in allowing the complete bank records relating to the draws on the construction account to be entered in evidence?

This is a construction defect case. The issues to be determined were (1) whether there were defects in the house at issue, and (2) if there were defects, what would cost take to repair them? The court, over objection of Defendants' attorney, allowed voluminous bank records to come into evidence, mostly consisting of the "Draw" information: showing what was paid as the house in issue was constructed. How much something cost was not relevant in determining if something was defective. A part of the

house either is defective or it is not, irregardless of what the part may have cost to create. Introduction of the bank records was solely intended to show the profit that Mr. Hatch made on the house, and to thereby somehow make him look bad. The bank records were irrelevant, and introducing them was highly prejudicial to the Defendants because it focused the jury on the overall profits made on the house, and away from whether an particular aspect of the house was defective. URE 410, 403.

In the alternative, the Court could have allowed the Plaintiff to ask about the cost of any particular items at issue, and then to impeach the Defendants or refresh their memory if needed. Putting in all the records was unnecessary and highly prejudicial.

Issue No. 16: Did the trial court err in allowing the heating contractor who installed the HVAC system in the house at issue in the lawsuit testify about his "feelings about the occupant of the home as [he] drove by"?

As set forth in the Statement of Facts, the trial court allowed a HVAC contractor–the very contractor who has installed the heating system in the original house for Defendant Hatch-- to testify about the "feelings" he had for the Morris family as he drove by the house. He testified that he felt horrible for the Morris family, and that he felt sorry for them. These statements were not statements of fact, but rather statements of a person–not a party–regarding feelings he had as he drove by a house. Such "feelings" in this context are not evidence and are not relevant to determining if defects exist in a house. They are not facts admissible to prove a case. Furthermore, even if they were relevant, their prejudicial effect would far outweigh whatever minimal evidentiary value

they might have. Utah Rules of Evidence 410, 403. This testimony was emotionally-charged, and could not help but inflame the jury and operate solely on the juries sympathies and emotions. This testimony was devastating to the Defendants as well.

Issue No. 17: Did the trial court err in allowing Plaintiff's architectural expert to testify about the nature of the crack in the turret?

Plaintiffs called Arthur Pasker, an architect, as an expert witness at trial. Mr. Pasker is not an engineer. During cross-examination or Mr. Pasker he testified that he did not know whether a particular crack in around the perimeters of a turret was structural (rather than cosmetic). (Trial Transcript, Vol. II, p. 436, lines 2-5).

Later on re-direct, Plaintiffs' attorney asked Mr. Pasker his opinion on why the crack had formed around the turret. Mr. Pasker again stated that he did not know, but then went on to speculate that because it was a horizontal crack, he was worried that it might be structural. Defense counsel objected to this line of questioning and moved the court to strike Mr. Pasker's answer because he was speculating. The Trial Court overruled the objection and allowed the testimony to stand. (Transcript, Vol. II, pp. 438 (lines 7-25) and 439 (lines 1-3)).

"The rule of evidence relative to the reliable testimony of an expert does not allow speculation." State v. Pendergrass, 803 P.2d 1261, 1265 (Utah App. 1990). In Stevensen v. Goodson, 924 P.2d 339 (Utah 1996), the Supreme Court upheld the trial court's decision to strike the testimony of a structural engineer concerning damage to the building in question resulting from tie-backs when, on cross-examination, the expert

admitted that he was speculating. Id. at 346-347.

Likewise in this case, Mr. Pasker admitted that he would be speculating as to the nature of the crack around the turret. Yet later, the trial court allowed him to testify that he was concerned that the crack was, in fact, structural. This testimony was improper speculation and harmful to the Defendants' case on a key issue at trial. This abuse of discretion by the Trial Court must be reversed on appeal.

Issue No. 18: Did the trial court err in allowing Christopher Miller to render expert plumbing testimony?

As set forth above, Christopher Miller was allowed by the Court to offer expert testimony in the plumbing area. He was never qualified as an expert. When defendants' attorney objected to his qualifications, the trial court acknowledged that no expert foundation had been established, and told Plaintiffs' attorney to qualify Mr. Miller as an expert. Instead of doing that, Plaintiffs' attorney kept on questioning him. When Defendants' attorney renewed his objection, he was overruled.

Mr. Miller rendered significant testimony about plumbing shortcomings in the house, even though there was no basis for him to do so. There are no facts in the record to support Mr. Miller's ability to testify as an expert in plumbing. He is not licensed, and he established none of the criteria required by Utah Rule of Evidence 702. He should never have been allowed to testify, and allowing him to testify was extremely damaging to the Defendants.

Issue No. 19: Did the court err in prohibiting the introduction of the Hatch offer to

purchase the house before trial for $463,000.00?

Defendant Guy Hatch made an offer to purchase the house at issue, an offer unrelated to the litigation (not conditioned in any way on a release of claims, etc.). His cash offer was not accepted by Plaintiffs Morris. The Plaintiffs claimed that it would cost over $200,000 to repair their house (and even then leave it with a stigma). Mr. Hatch's offer was to buy the house back, for $30,000 more than the Morrises had purchased the house for. This was highly relevant to Defendants' argument that the Morrises were not as damaged as they claimed, and was in no way a settlement offer (it was not an offer to compromise the claim in any way– the lawsuit could have gone on). The evidence should have been received.

Issue No. 20: Did the cumulative effect of all the above-cited errors create a situation where a fair trial could not and did not take place before the trial court?

Defendants believe that all of the above-referenced errors were harmful (and not harmless) to their case. The cumulative effect, however, is devastating. In the trial at issue, there was a pattern of continual denial of proper objections, the sustaining of objections that are not even made, and improper rulings on key issues. These errors compounded on one another, were all made in the presence of a jury. Perhaps this Court will find, as did the Utah Supreme Court in Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990): "While no one error by itself perhaps mandates reversal, the cumulative effect of the several errors undermines our confidence that defendants were able to present to the jury their theory of the case and that a fair trial was had."

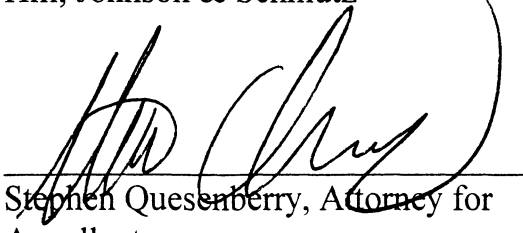
Cumulative error is about essential fairness. The pattern of rulings in this trial seem to indicate that the Defendants were simply not given a fair trial.

CONCLUSION

Based on the above-reasoning and argument, Defendants respectfully request that the award of attorneys fees be reversed, and that no attorneys fees be awarded to Plaintiffs. In the alternative, Defendants request that the award of attorneys fees be reduced, or the this Court remand the attorneys fees matter back to the trial judge for a reduction. Defendants further request that the judgments against Defendant Linda Hatch and Defendant Guy Hatch be reversed for insufficiency of the evidence. Defendants further request that the judgments against Defendants Parkinson be reversed, based on the arguments about caveat emptor and warranty. In the alternative, Defendants ask that a new trial be granted, based on the numerous evidentiary errors and the cumulative effect of the errors, as well as on the other grounds that have been addressed in this brief.

Dated this 8th day of May, 2000.

Hill, Johnson & Schmutz



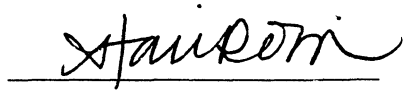
Stephen Quesenberry, Attorney for Appellants

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 8th day of May 2000, they caused a true and correct copy of the foregoing Appellants' Brief to be delivered to the following:

Mark O. Morris
Snell & Wilmer, LLP
111 East Broadway, Suite 900
Salt Lake City, Ut 84111

Sent Via:
_____ Hand -Delivery
_____ Facsimile
_____ Mailed (postage prepaid)



ADDENDUM

Tab A

STEPHEN QUESENBERRY (8073)
HILL, JOHNSON & SCHMUTZ P.C.
Jamestown Square
3319 North University Avenue, Suite 200
Provo, Utah 84604
Telephone: (801)375-6600
Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH, Defendants.	MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No. 970400584 Judge Ray Harding Jr.

Defendants, by and through their counsel of record, hereby move this Court for partial summary judgment in the above-entitled matter on Plaintiffs' first cause of action for breach of contract and on Plaintiffs' third cause of action for intentional or negligent misrepresentation. This motion is made pursuant to Rule 56 of the Utah Rules of Civil Procedure, on grounds that there exists no genuine issue of material fact as to certain claims made by Plaintiffs in connection with its first and third causes of action and Defendants are entitled to judgment on such claims as a matter of law.

In support of this Motion, Defendants have submitted an accompanying Memorandum of Points and Authorities and the Affidavit of Guy Hatch.

DATED this 15th day of December, 1998.

HILL, JOHNSON & SCHMUTZ, P.C.

STEPHEN QUESENBERRY
Attorneys for Defendants

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 15 day of December, 1998, they caused a true and correct copy of the foregoing to be delivered to the following:

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Salt Lake City, Utah 84111

Sent Via:
✓ Hand -Delivery
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✓ Mailed (postage pre-paid)

Courtney Hughes

4TH DISTRICT COURT, PROVO DEPT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS Et al, Plaintiff,	:	MINUTES ORAL ARGUMENTS
vs.	:	Case No: 970400584 CV
DAN PARKINSON Et al, Defendant.	:	Judge: RAY HARDING, JR. Date: January 19, 1999

Clerk: miket

PRESENT

Plaintiff's Attorney(s): MARK O MORRIS
Defendant's Attorney(s): LANCE N LONG
STEPHEN QUESENBERRY
Video
Tape Number: 4 Tape Count: 11:07

HEARING

Mr Morris addresses the court. The court denies the Motion for Summary Judgment. Mr Long addresses the court as to the Motion In Limine. Mr Morris responds. Mr Long responds. The court questions counsel. Discussion ensues.

The court denies the Motion In Limine as to witnesses, but the matter may be raised again during the trial.

Mr Long addresses the court as to the remaining evidence. Mr Morris responds. Discussion ensues. Counsel reach a stipulation concerning certain evidence. The court approves the stipulation.

As to the remaining issues, the court denies the Motion In Limine as premature.

Counsel review disputes over proposed jury instructions and voir dire.

Tab B

JAN 8 4 43 PM '99

STEPHEN QUESENBERRY (8073)
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Telephone: (801)375-6600
Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH, Defendants.	DEFENDANTS' MOTION IN LIMINE Civil No. 970400584 Judge Ray Harding Jr.

Defendants file this Motion in Limine to exclude certain witness from testifying, and to exclude testimony from any person on certain issues as set forth below. This Motion is supported by the accompanying Memorandum of Points and Authorities submitted herewith.

I. Defendants should not be allowed to call the following witnesses.

A. "Fact and Possibly Expert Witnesses"

The only issues before the Court, and the only issues which should be presented to the

jury, deal with the construction of the subject home located at 9 Meadowbrook Drive in Alpine, Utah, and specifically whether there was a warranty issued by Hatch to Plaintiffs, the extent thereof, and whether it was honored. Examples of matters *not* at issue, but which Plaintiffs are apparently attempting to interject, are such matters as Hatch's credit record, Hatch's former dealings in the construction industry and, incredibly, Hatch's former dealings in the *restaurant* business.

The numerous potential witnesses identified by Plaintiffs have no personal knowledge of the issues before the Court, and therefore should not be allowed to testify on grounds of competence, URE 602; relevance, URE 402; hearsay, URE 801 and 802; and unfair prejudice, URE 403. These witnesses are: Roger Zundel (No. 14); Howard Sigel (No. 15); Charmayne Allsop (No. 16); Allen Van Orman[1] (No. 17); Kirk and Mary Hoeffling (No. 20); Craig Nielson (No. 22); Robert Harris (No. 29); Rodger Smith (No. 30); and individuals with relevant knowledge at Carson Excavating, Nicholas & Company, CMA, All Seasons Insulation, Inc.; Standard Restaurant Equipment; and Credit Bureau of Ogden (Nos. 31-36).

The witnesses are persons with whom Defendants, particularly defendant Hatch, has had dealings in the past, *none of which* relate to the house at issue, and some of which do not even pertain to the construction business. Testimony from these witnesses could only be presented for

---

[1]Mr. Van Orman's testimony should further be excluded because he has been dead for several years. Defendants respectfully submit that, since Mr. Van Orman is beyond the subpoena power of the Court, Defendants will be deprived of their right to conduct meaningful cross examination.

the purpose of showing "prior bad acts" or possible dishonesty of Defendants, and should therefore not be allowed under URE 404(b), 608, and 403.

Plaintiff therefore move that this Court enter its order excluding any of these witnesses from testifying.

B. Defendants' Expert Witnesses

Defendants retained two expert witnesses, Peter Williams and Ray Noble, to assist with trial preparation. These experts also prepared a report titled "Inspect-A-Home USA". These witnesses will not be called at trial.

Defendants move for the Court's order that Plaintiffs should not be allowed to call these witnesses or to utilize the witnesses' report at trial, or in any way refer or allude to the fact that these witnesses were retained by Defendants. Their testimony is not discoverable under URE 26(b)(4)(B) and the work product doctrines, and the fact that they were ever retained by Defendants should not be presented to the jury under URE 402 and 403.

II. Evidence or testimony of certain issues should not be admitted.

Defendants submit that numerous issues which have arisen during the course of discovery should not be introduced as evidence at trial, and therefore move that this Court enter its order that Plaintiffs not introduce any evidence, or make any reference, allusion, or implication to the jury regarding the following issues, for the reasons noted and discussed further in the accompanying memorandum:

A. A fire at the subject house. URE 402, 403.

B. The family relationship or employment of Plaintiff, John Covey. URE 402, 403.

C. The religious affiliation of any party to or witness in this action. URE 402, 403.

D. The character of Defendants. URE 608, 404, 402 and 403.

E. Settlement offers or settlement discussions. URE 408, 402 and 403.

F. The timing of payments by Defendant Hatch to any subcontractors or suppliers, or any alleged improprieties regarding the construction financing on the subject house. URE 402, 403.

G. The total cost of the home, or Defendants' profit or loss on the sale of the home. URE 402, 403.

H. A "punch list." URE 1002.

I. Defects first "noticed" after the two year warranty period had expired. URE 402, 403.

J. Defects of which the Plaintiffs had actual or constructive knowledge at the time they bought the home. URE 402, 403.

CONCLUSION

This case is based on, and should be decided on, a very narrow issue--whether there was a warranty from Hatch to Plaintiffs, the extent of that warranty, and whether it was honored. Any other matters regarding the history of Defendants and particularly Defendant Hatch as set forth

above are extraneous, irrelevant, and prejudicial, and should be excluded. Defendants therefore move this court to enter its order excluding the witnesses named in Section I above, and ordering that no party or witness provide any testimony which refers, relates, or alludes to, or in any way insinuates any of the issues listed in Section II above.

DATED this 14 day of January, 1999.

Hill, Johnson & Schmutz P.C.

Stephen E. Quesenberry

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7 day of January, 1999, they caused a true and correct copy of the foregoing to be delivered to the following:

Mark O. Morris
Snell & Wilmer
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

Sent Via:
_____ Hand -Delivery
__✓__ Facsimile
__✓__ Mailed (postage pre-paid)

4TH DISTRICT COURT, PROVO DEPT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS Et al, Plaintiff,	:	MINUTES ORAL ARGUMENTS
vs.	:	Case No: 970400584 CV
DAN PARKINSON Et al, Defendant.	:	Judge: RAY HARDING, JR. Date: January 19, 1999

Clerk: miket

PRESENT

Plaintiff's Attorney(s): MARK O MORRIS
Defendant's Attorney(s): LANCE N LONG
STEPHEN QUESENBERRY
Video
Tape Number: 4 Tape Count: 11:07

HEARING

Mr Morris addresses the court. The court denies the Motion for Summary Judgment. Mr Long addresses the court as to the Motion In Limine. Mr Morris responds. Mr Long responds. The court questions counsel. Discussion ensues.

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As to the remaining issues, the court denies the Motion In Limine as premature.

Counsel review disputes over proposed jury instructions and voir dire.

Tab C

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Telephone: (801)375-6600
Attorneys for Defendants

1999 JAN 22 AM 8:17

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH, Defendant.	Defendants' Proposed Disputed Jury Instructions Civil No. 970400584 Judge Ray Harding Jr.

Defendants, through counsel, submit the following disputed jury instructions numbered D-1 and D-2. For the reasons set forth in Defendants' Motion for Partial Summary Judgment, Defendants submit that these instructions should be presented to the jury.

DATED this 22nd day of January, 1999.

Stephen Quesenberry
Attorney for Defendants

DEFENDANTS' PROPOSED INSTRUCTION NO. D-1

You are instructed that the law of Utah recognizes the doctrine of *caveat emptor* in regard to the sale of a used building. Under the doctrine of *caveat emptor*, a buyer may not recover for any defects in a property of which he was aware, or reasonably should have been aware, at the time the plaintiff agreed to purchase the property.

If you find that the plaintiffs Michael and Elizabeth Morris knew, or in the exercise of reasonable diligence should have known, about the existence of all matters which they allege to be defective, then your verdict must be for Guy Hatch.

Similarly, if you find that the plaintiffs Michael and Elizabeth Morris knew, or in the exercise of reasonable diligence should have known, about the existence of some, but not all, of the matters which they allege to be defective, then you may not award damages to the plaintiffs for those matters.

Reference: Utah State Medical Assoc. v. Utah State Employees Credit Union, 655 P.2d 643, 645 (Utah 1982)

DEFENDANTS' PROPOSED INSTRUCTION NO. D-2.

The Court instructs you that a warranty, as it applies to a home, does not extend to provide coverage to matters which were known to the purchaser at the time of the purchase.

If you find that the plaintiffs Michael and Elizabeth Morris knew at the time of the purchase about the existence of all matters which they allege to be defective, then your verdict must be for defendant Hatch.

Similarly, if you find that the plaintiffs Michael and Elizabeth Morris knew at the time of the purchase about the existence of some, but not all, of the matters which they allege to be defective, then you may not award damages to the plaintiffs for those matters.

Reference: Groen v. Tri-O Inc., 667 P.2d 598 (Utah 1983); *Maack v. Resource Design & Construction,* 875 P.2d 570 (Utah App. 1994), *citing Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo. 1979).

CERTIFICATE OF SERVICE

I, Stephen Quesenberry, hereby certify that I served a copy of the above and foregoing Defendants' Proposed Disputed Jury Instructions to Michael Morris by hand-delivery.

DATED this 22d day of January, 1999.

4TH DISTRICT COURT, PROVO DEPT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS Et al, Plaintiff,	:	MINUTES JURY TRIAL
vs.	:	Case No: 970400584 CV
DAN PARKINSON Et al, Defendant.	:	Judge: RAY HARDING, JR. Date: January 22, 1999

Clerk: shonay
Reporter: MEL POWERS

PRESENT

Plaintiff(s): MICHAEL MORRIS
ELIZABETH MORRIS
Defendant(s): LINDA HATCH
GUY HATCH
Plaintiff's Attorney(s): MARK O MORRIS
Defendant's Attorney(s): STEPHEN QUESENBERRY
Video

TRIAL

Jury trial is in it's 3rd day. David Layton resumes the stand and continues to testify as called by Mr Morris. Pltf's #46 off. & rec'd. Cross-exam by Mr Quesenberry. Def's #55 g off. & rec'd. Def's #64 A mk, id (photo), off. & rec'd. Photos are published. Def's #64 f, & g id (photos), off. & rec'd. Photos are published. Def's 57A id (photo). Def's #57 B id (photo) Def's 57 C id (photo). Def's 57D id (photo). Def's #57E id (photo). Def's #57 F,G,H, I, J, K, L, M, N, O, Q, R, U off. all received except R & U. Re-direct by Mr Morris. Re-cross by Mr Quesenberry. Re-direct by Mr Morris. Jury is excued for lunch. Counsel and Court discuss the jury insturctions and the special verdict. Both counsel stipulate to instructions 1-36. Mr Quesenberry addresses instruction #37. Response by Mr Morris. Court concurs with the pltf and denies instruction #37. Mr Quesenberry addresses instruction as to warranty. Response by Mr Morris. Instruction as

---

to warranty is denied. Court having viewed def's #66 (video) denies the exhibit. Michael P. Morris sworn and testifies as called by Mr Morris. Pltf's #41 A published to the jury. Pltf's #41 BBB published to the jury. Pltf's #37 id (invoice), off. & rec'd. Cross-exam by Mr Quesenberry. Def's # 56 EE id (photo), off. Def's #53 id. Re-direct by Mr Morris. Re-cross by Mr Quesenberry. Jury is excused. Plaintiff rests. Mr Quesenberry makes a motion for direct verdict with argument to the court. Response by Mr Morris. Mr Quesenberry responds. Motion taken under advisement. Darrin Smith sworn and testifies as called by Mr Quesenberry. Cross-exam by mr Morris. Theron Bunker sworn and testifies as called by Mr Quesenberry. Cross-exam by Mr Morris. Re-direct by Mr Quesenberry. Re-cross by Mr Morris. Scott Prestwich sworn
testifies as called by Mr Quesenberry. Re-cross by Mr Morris. Deposition of Scott Prestwich published as requested by Mr Morris. Re-direct by Mr Quesenberry. Steven Robins sworn and testifies as called by Mr Quesenberry. Cross-exam by Mr Morris. Rick Roberts sworn and testifies as called by mr Quesenberry. Cross-exam by Mr Morris. Tracy Burnham sworn and testifies as called by Mr Quesenberry. Cross-exam by Mr Morris. Re-direct by Mr Quesenberry. Re-cross by Mr Morris. At 5:02 p.m. court recesses until
1/25/99 at 9:30 a.m. Jury is excused. Court speaks with both counsel.

Tab D

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
4-7-99 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS, and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, and GUY HATCH, Defendants.	**RULING** Case No. 970400584 Judge Ray M. Harding, Jr.

This matter comes before the Court on Plaintiffs' Motion for Award of Attorney's Fees and Costs, and on Defendants' Motion to Tax Costs. The Court has reviewed the file, the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, hereby issues the following:

RULING

On February 3, 1999, Plaintiffs filed with this Court Plaintiffs' Motion for Award of Attorney's Fees and Costs, with an accompanying memorandum. On February 16, 1999, Defendants filed with this Court Defendants' Motion to Tax Plaintiffs' Bill of Costs. Also on February 16, 1999, Defendants filed a Memorandum in Support of Defendants' Motion to Tax Costs and in Opposition to Plaintiffs' Motion for Award of Attorney's Fees and Costs. On February 26, 1999, Plaintiffs' filed a Reply Memorandum in Support of Plaintiffs' Motion for Award of Attorney's Fees and Costs. On April 6, 1999, the Court heard oral arguments on these matters.

Plaintiffs seek an award of attorney's fees based on the jury verdict rendered on January 26, 1999. In that verdict, the jury found in favor of Plaintiff Michael Morris and Plaintiff Elizabeth Morris on the breach of contract claim in the amount of $42,220.00 to be paid by Defendant Dan Parkinson and Cynthia Parkinson. The jury found in favor of Defendant Guy Hatch on the intentional or negligent misrepresentation claim. The jury found in favor of Plaintiff John Covey on the breach of contract claim in the amount of $5,000.00 to be paid by Defendant Linda Hatch. Finally, the jury found in favor of Plaintiff Michael Morris and Plaintiff Elizabeth Morris on the violation of real estate agency statutes claim in the amount of $9,792.00 to be paid by Defendant Guy Hatch. The Court will address the attorney's fees issue and the costs issue in turn.

Attorney's Fees

"Attorney fees may only be awarded if authorized by statute or contract." Canyon Country Store v. Bracey, 781 P.2d 414, 419-20 (Utah 1989). "However, regardless of whether the basis for an award of fees is contractual or statutory, only a reasonable fee may be recovered." Id. at 420.

Plaintiffs claim that they should recover their reasonable attorney's fees incurred in prosecuting their breach of contract claim. The Plaintiffs cite to paragraph 17 of the Real Estate Purchase Contract (hereinafter "REPC") which states that "[i]n any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees." Second, Plaintiffs claim that the amount of their requested attorney's fees are reasonable under the circumstances.

Defendants claim that the attorney's fees provision in the REPC was abrogated and so not applicable. The Defendants cite to paragraph 19 of the REPC which states that "[e]xcept for the express warranties made in this Contract, the provisions of this Contract shall not apply after closing." Second, the Defendants claim that the Plaintiffs are not entitled to attorney's fees because there were no attorney's fees expended. Specifically, that Plaintiffs' attorney agreed to perform legal services on behalf of the Plaintiffs without requiring that they should be personally obligated for the fees incurred. Finally, the Defendants claim that the Plaintiffs' attorney's fees are excessive and unreasonable.

Generally, an abrogation provision in a real estate purchase contract has the effect of making the deed the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable. See Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); Espinoza v. Safeco Title Ins. Co., 598 P.2d 346 (Utah 1979). "However, if the original contract calls for performance by the seller of some act collateral to conveyance of title, his obligation with respect thereto survive the deed and are not extinguished by it." Stubbs v. Hemmert 567 P.2d at 169.

In this case, both the attorney's fees provision and the abrogation provision are standard contract provisions found in real estate purchase contracts. The jury found that Defendant Dan Parkinson and Defendant Cynthia Parkinson had breached the REPC. Although not stated in the Jury Verdict, it is clear that the jury found from the evidence presented at trial that Defendant Dan Parkinson and Defendant Cynthia Parkinson violated paragraph 9 of the Addendum to the REPC which states that "Seller warrants all workmanship,

habitability, systems of all kinds, and roof for period of two years." This express warranty clearly was meant by the parties to be collateral to the conveyance of title and so survives the abrogation provision.

The Defendants cite to Espinoza v. Safeco Title Ins. Co. as controlling in this case. However, "[i]ssues relating to title and encumbrances are central rather than collateral to agreements for the sale of real property." Maynard v. Wharton, 912 P.2d 446, 450 (Utah Ct. App. 1996). Espinoza v. Safeco Title Ins. Co. involved an encumbrance which was central rather than collateral to the agreement for the sale of real estate, so the Court finds Espinoza v. Safeco Title Ins. Co. inapplicable.

Rather, the Court finds Maynard v. Wharton to be controlling in this case. Specifically that "attorneys fees may be awarded . . . only when one party can show that the other party has defaulted on an explicit covenant or agreement contained in the earnest money agreement." Id at 452. In Maynard v. Wharton, the sellers could not point to an express agreement to which the buyers defaulted, so the Court could not award of attorney's fees, but the Court went on to suggest that an award of attorney's fees may have been proper had the sellers pointed to a violation of an express agreement in the contract. See id. In this case, the jury clearly found that Defendant Dan Parkinson and Defendant Cynthia Parkinson had violated an express agreement between the parties, so attorney's fees are proper. As a result, the Plaintiffs' are entitled to reasonable attorney's fees.

The Defendants second objection to an award of attorney's fees is based on an agreement between Plaintiffs' attorney and the Plaintiffs whereby the Plaintiffs' attorney

agreed to perform legal services on behalf of the Plaintiffs without requiring that they should be personally obligated for the fees incurred. The Court finds Barker v. Utah Pub. Serv. Comm'n, No. 960080, 338 Utah Adv. Rep. 3, 8 (Utah Mar. 3, 1998) dispositive on this issue which states as follows:

> Whether the attorneys provided their services pro bono, at a discount, or at full market rate does not effect a determination of reasonable attorney fees. See Blum v. Stenson, 465 U.S. 886, 895, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984); Ramos v. Lamm, 713 F.2d 546, 551 (10th Cir. 1983). Although both these cases concern a federal civil rights statute, the rationale that justifies their findings is the same: The rule instructs courts to consider the market rate for legal services, not to reduce the rates for pro bono services or reduced costs. See id.

The Court having found no Utah law to the contrary, hereby finds that the mere fact that Plaintiffs' attorney agreed to perform his services pro bono but reserving his rights to seek an award of attorney's fees under the REPC does not effect a determination of reasonable attorney's fees.

Next, this Court must determine whether Plaintiffs' attorney's fees are reasonable under the circumstances. In determining the reasonableness of requested attorney's fees the Court must answer the questions stated in Dixie State Bank v. Bracken, 764 P.2d 985, 989-90 (Utah 1988), and set forth below:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require additional factors, including those listed in the Code of Professional Responsibility?

The last question set forth in Dixie State Bank is a catch-all question which may include any of the factors found in Rule 1.5 of the Utah Rules of Professional Conduct, which reads as follows:

> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

In this case, Plaintiffs' Affidavit of Attorney's Fees and Costs has not sufficiently addressed all of the questions listed in Dixie State Bank nor all of the factors found in Rule 1.5 of the Utah Rules of Professional Conduct. Therefore, Plaintiffs' attorney shall supplement his Affidavit of Attorney's Fees and Costs to address the foregoing within 10 days of this Ruling. Upon receipt of Plaintiffs' attorney's Supplemental Affidavit of Attorney's Fees and Costs, the Defendants shall have 10 days to file a written objection. If an objection is filed, then the matter will be set for oral argument.

Costs

Pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure, "[e]xcept when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . " "Costs" as used above "means those fees which are required to be paid to the court and to witnesses,

and for which the statutes authorize to be included in the judgment." Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980). Basically, the "trial court can exercise reasonable discretion in regard to the allowance of costs; and that it has a duty to guard against any excesses or abuses in the taxing thereof." Id.

The Plaintiffs claim that they are entitled to their costs pursuant to paragraph 17 of the REPC which states that "[i]n any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees." In the alternative, the Plaintiffs claim that they are entitled to their costs pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure. At the outset, the Court finds that paragraph 17 of the REPC should not be read to allow more costs than is generally allowable under Rule 54(d) of the Utah Rules of Civil Procedure. Therefore, whether the Plaintiffs rely on paragraph 17 of the REPC or Rule 54(d) of the Utah Rules of Civil Procedure for their claimed costs, the result will be the same.

Defendants motion this Court to have the bill of costs taxed, pursuant to Rule 54(d)(2) of the Utah Rules of Civil Procedure. Defendants claim that the costs claimed by the Plaintiffs which include service of process for depositions, courier services, phone/fax charges, photocopies, depositions, photographs, travel/mileage, and expert witness fees are not recoverable. In addition, Defendants claim that the Plaintiffs have not properly supported their claims for filing and jury fees, necessary service of process fees (not including deposition subpoenas) and witness fees.

Utah courts have been somewhat inconsistent in determining just what costs are recoverable under Rule 54(d) of the Utah Rules of Civil Procedure. The Court should

therefore carefully guard against any excesses or abuses of claimed costs. See Frampton v. Wilson 605 P.2d at 774.

With respect to deposition costs, the party claiming them "has the burden of demonstrating that the depositions were reasonably necessary; determining whether that burden is met is within the sound discretion of the trial court." Lloyd's Unlimited v. Nature's Way Mktg., Ltd., 753 P.2d 507, 512 (Utah Ct. App. 1988). The Plaintiffs claim that all of the depositions taken were of witnesses at trial. In addition, the Plaintiffs used the depositions in the preparation of Plaintiffs cross examination. The Court finds that the Plaintiffs have carried their burden to demonstrate that the deposition costs were reasonably necessary.

With respect to service of depositions, "[t]he Utah Supreme Court has declined to extend the rule, which allows recovery of the cost of taking a deposition, to expenses such as service of a deposition." Id. Therefore, the Court finds that any service of depositions in this case are not taxable as costs.

With respect to expert witness fees, "the courts hold that expert witnesses cannot be awarded extra compensation unless the statute expressly so provides." Frampton v. Wilson, 605 P.2d at 774. Pursuant to Utah Code Ann. § 21-5-4(1), "[e]very juror and witness legally required or in good faith requested to attend a trial court of record or not of record or a grand jury is entitled to $18.50 for the first day of attendance and $49 per day for each subsequent day of attendance. . . ." The Court finds that the Plaintiffs are only entitled to the statutory compensation provided in Utah Code Ann. § 21-5-4(1).

With respect to miscellaneous expenses such as models, photographs, and copies, they are generally not taxable as costs. See Frampton v. Wilson, 605 P.2d at 774. In addition, pre-litigation investigation, accountant fees, travel expenses, and lost personnel and secretarial time are generally not taxable as costs. See Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 965 n.13 (Utah Ct. App. 1989). The Court finds that the Plaintiffs are not entitled to miscellaneous expenses such as models, photographs, copies, pre-litigation investigation, accountant fees, travel expenses, and lost personnel and secretarial time.

In conjunction with the Plaintiffs' Supplemental Affidavit of Attorney's Fees and Costs, the Plaintiffs shall supplement their Bill of Costs to be in conformity with the foregoing within 10 days of this Ruling. Upon receipt of Plaintiffs' Amended Bill of Costs, the Defendants shall have 10 days to file a written objection. If an objection is filed, then the matter will be set for oral argument.

Conclusion

For the foregoing reasons, this Court hereby rules as follows:

1. Plaintiffs' Motion for Attorney's Fees is **GRANTED**. The Plaintiffs' attorney shall supplement his Affidavit of Attorney's Fees and Costs to address the issues in this Ruling within 10 days of this Ruling. Upon receipt of Plaintiffs' attorney's Supplemental Affidavit of Attorney's Fees and Costs, the Defendants shall have 10 days to file a written objection. If an objection is filed, then the matter will be set for oral argument.

2. Defendants' Motion to Tax Costs is **GRANTED**. In conjunction with the Plaintiffs' Supplemental Affidavit of Attorney's Fees and Costs, the Plaintiffs shall supplement their Bill

of Costs to be in conformity with the foregoing within 10 days of this Ruling. Upon receipt of Plaintiffs' Amended Bill of Costs, the Defendants shall have 10 days to file a written objection. If an objection is filed, then the matter will be set for oral argument.

Counsel for Plaintiffs shall prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 7th day of April, 1999.

RAY M. HARDING, JR., JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling with postage prepaid thereon this 23rd day of April, 1999, to the following:

Mark O. Morris
SNELL & WILMER
111 East Broadway, Suite 900
Salt Lake City, Utah 84111-5225

Stephen Quesenberry
Lance Long
HILL, JOHNSON & SCHMUTZ P.C.
Jamestown Square
3319 North University Avenue, Suite 200
Provo, Utah 84604

Law Clerk

FILED
Fourth Judicial District Court
of Utah County, State of Utah
5/27/99 MDT Deputy

Mark O. Morris, Esq. (A4636)
SNELL & WILMER L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111-5225
Telephone: (801) 237-1900
Facsimile: (801) 237-1950

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, GUY HATCH, Defendants.	**ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS, AND GRANTING DEFENDANTS' MOTION TO TAX COSTS** Civil No. 970400584 Judge Ray M. Harding, Jr.

Plaintiffs' Motion for Award of Attorney's Fees and Costs, and Defendants' Motion to Tax Costs both came on for regularly scheduled hearing on April 6, 1999. Mark O. Morris appeared on behalf of Plaintiffs. Lance N. Long appeared on behalf of Defendants. After having reviewed the memoranda of law, affidavits, and other materials supplied to the court in connection with the foregoing motions, and after having entered rulings on said motions on April 7, 1999, and on April 23, 1999, and for good cause shown,

The Court finds as follows:

1. The Real Estate Purchase Contract at issue herein expressly provided for an award of a reasonable attorney's fee and costs to the prevailing party herein.

2. Plaintiffs are the prevailing parties in this action.

3. Paragraph 19 of the Real Estate Purchase Contract does not operate to bar plaintiffs' claim for attorney's fees and costs, for the reason that the Real Estate Purchase Contract called for performance by defendants Dan and Cynthia Parkinson of acts collateral to the mere conveyance of title. Hence the parties' obligations under the Real Estate Purchase Contract, including the obligation to pay a reasonable attorney's fees and costs in the event of a breach of a specific condition or term of said agreement, were not extinguished at closing.

4. Because the Real Estate Purchase Agreement authorizes the payment of a reasonable attorney's fee to the prevailing parties, without more, this Court may and should make an award of reasonable attorney's fees, notwithstanding the fact that plaintiffs' counsel agreed to perform his services pro bono.

5. Plaintiffs' counsel's Affidavit of Attorney's Fees and Costs failed to describe with sufficient particularity those aspects required by Utah common law and Rule 1.5 of the Utah Rules of Professional Conduct.

6. The only costs which shall be awarded to the plaintiffs herein are those allowed under Rule 54 of the Utah Rules of Civil Procedure.

7. Plaintiffs carried their burden of demonstrating that deposition costs were reasonably necessary in this matter.

8. Plaintiffs' are entitled to their deposition costs, filing fees, fees incurred for service of process upon the defendants herein, and statutory witness fees.

9. As to the monies plaintiffs expended on courier services, phone and fax charges, photocopies, photographs and travel expense those shall not be awarded as costs herein.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Attorney's Fees and Costs is granted in part and denied in part, and Defendants' Motion to Tax Costs is granted. It is further Ordered that Plaintiffs shall have until May 3, 1999 to submit a Supplemental Affidavit of Attorney's Fees, and an Amended Bill of Costs, both which shall conform with this Court's rulings of April 7, 1999 and April 23, 1999.

DATED this 22nd day of May, 1999.

BY THE COURT:

Honorable Ray M. Harding, Jr.
Fourth District Court Judge

SIGNAL IF IN RED INK
STATE OF UTAH

APPROVED AS TO FORM:

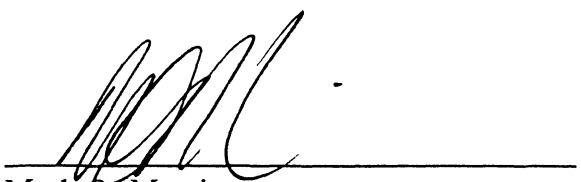
HILL, HARRISON, JOHNSON & SCHMUTZ

Stephen Quesenberry
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Order Granting Plaintiffs' Motion for Award of Attorneys's Fees and Costs, and Granting Defendants' Motion to Tax Costs to be served via facsimile on the 3rd day of May, 1999, to:

Stephen Quesenberry, Esq.
HILL, HARRISON, JOHNSON & SCHMUTZ
3319 North University Ave., Suite 200
Provo, Utah 84604



Mark O. Morris

Tab E

TVITCV1

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
7-14-99 By Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS, and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, and GUY HATCH, Defendants.	**RULING** Case No. 970400584 Judge Ray M. Harding, Jr.

This matter comes before the Court on Defendants' Objection to Plaintiff's Second Supplemental Affidavit for Award of Attorney's Fees and Costs. The Court has reviewed the file, the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, hereby issues the following:

RULING

"Attorney fees may only be awarded if authorized by statute or contract." Canyon Country Store v. Bracey, 781 P.2d 414, 419-20 (Utah 1989). "However, regardless of whether the basis for an award of fees is contractual or statutory, only a reasonable fee may be recovered." Id. at 420. This Court in its Ruling dated April 7, 1999, granted the Plaintiffs their reasonable attorney's fees and costs based on paragraph 17 of the Real Estate Purchase Contract. However, the Court did not determine the reasonableness of the attorney's fees and costs expended.

This Court must now determine whether Plaintiffs' attorney's fees and costs are reasonable under the circumstances. In determining the reasonableness of requested attorney's fees the Court must answer the questions stated in Dixie State Bank v. Bracken, 764 P.2d 985, 989-90 (Utah 1988), and set forth below:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require additional factors, including those listed in the Code of Professional Responsibility?

There was extensive legal work performed by both parties in this case. This legal work included the following: initiating a law suit for breach of the Purchase Agreement, breach of Improvement Agreement, misrepresentation by omission, and breach of Real Estate Statutes; amended complaints were filed; discovery conducted; correspondence between counsel; settlement negotiations; mediation; preparation for a jury trial; a five-day jury trial; and post trial motions. In particular, a Complaint, an Amended Complaint, a Second Amended Complaint, an Answer, numerous depositions and other discovery, a Continuance because of new counsel on the part of the Defendant, a response to Defendant's Motion for Partial Summary Judgement, a response to Defendant's Motion in Limine, numerous hearings for oral arguments, a Proposed Trial Plan, a five day jury trial, and numerous post trial motions. Every hearing and the trial held before this Court required counsel for the Plaintiffs to travel from Salt Lake County to Utah County.

The work performed by Plaintiffs' counsel was reasonably necessary to prosecute the matter. The Plaintiffs initiated this action against the Defendants for breach of the Purchase Agreement, breach of Improvement Agreement, misrepresentation by omission, and breach of Real Estate Statutes. The Plaintiffs bore the burden or proof throughout the trial of these issues. The pleadings and hearings referred to above appear reasonably necessary under the circumstances. Although not extremely complicated, this litigation was very fact intensive and required the use of numerous experts.

Plaintiffs' counsels' billing rates are consistent with the rate customarily charged in the locality. Mark Morris is billing at the rate of $190.00 per hour. He is an experienced litigator with the law firm of Snell & Wilmer. He has more than 14 years experience and is admitted to practice before the Federal District Courts of Utah and Arizona, the U.S. Court of Appeals for the Tenth and Ninth Circuits, and the U.S. Supreme Court. Mark Morris' billing rate of $190.00 per hour is consistent with rates customarily charged in this locality for an attorney of his credentials and experience. Therefore, Mark Morris' billing rates of $190.00 per hour is fair and reasonable under the circumstances.

Both Dan Garrison, an associate with Snell & Wilmer and Adrianne Goldsmith, a summer associate worked briefly on this case. Dan Garrison bills at the rate of $130.00 per hour. Adrianne Goldsmith bills at the rate of $70.00 per hour. Both Dan Garrison and Adrianne Goldsmith billing rates are consistent with rates customarily charged in this locality for associates of their credentials and experience. Therefore, both Dan Garrison's and Adrianne Goldsmith's billing rates are fair and reasonable under the circumstances.

The last question set forth in Dixie State Bank is a catch-all question which may include any of the factors found in Rule 1.5 of the Utah Rules of Professional Conduct, which reads as follows:

> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

The aforementioned factors have factors within factors and were extremely important in assessing the reasonableness of the attorney's fees requested and each will be discussed in some detail.

First, the time and labor required by this case was extensive, as has been previously mentioned. The week of jury trial required around the clock preparation and attention of all the attorneys involved in this case. This case involved numerous issues, it required the use of extensive expert testimony by both parties, and was extremely fact sensitive. Finally, the claims in this case required the attorney for the Plaintiffs to be a skilled litigator so as to fetter out all the facts and issues in order to perform the legal services properly and to carry the burden of proof in this case.

Second, since the inception of this case, it was likely that the acceptance of this case would preclude other employment for Mark Morris, even though this case involved his family.

It is likely that the attorneys for both sides were aware that a jury trial would be the final result given the polarity of the respective parties positions. Also, that extensive discovery would need to be completed, that motions would need to be filed and briefed and that extensive preparation for a jury trial would need to take place. The foregoing would clearly preclude the attorneys involved in this case from accepting other employment.

Third, this Court finds that the attorney's fees requested are consistent with the fees customarily charged in this locality for similar legal services. This Court gave full consideration to the following: the specialized nature of this litigation, the claims involved and the counter-claims involved, the time and labor required, the time constraints imposed by the Court and the expertise necessary to both prosecute and defend the claims involved. This Court believes that any law firm capable of trying a case such as this, would have incurred attorney's fees in a similar amount as requested in this case.

Fourth, the amount involved in this case from the outset was approximately $150,000.00 with the possibility of an award of costs and attorney's fees. The Plaintiffs were successful on all of their claims, except their misrepresentation by omission and the jury awarded a verdict in the amount of $57,012.00.

Fifth, there were time limitations imposed by the Court. This case was subject to a Scheduling Order, which the Court enforced. In addition, much of the attorney's fees expended were within the closing months before trial after the settlement negotiations had not proved fruitful.

Sixth, the nature and length of the professional relationship with the client had little or no effect on this Court's task of determining the reasonableness of the attorney's fees requested. However, the nature and length of the personal relationship with the client was extensive, since they are brothers. Counsel for Plaintiffs affirmed in his affidavit that his client performed many of the tasks of a paralegal, but without compensation.

Seventh, the experience, reputation and ability of the attorney's involved was discussed in detail above.

Eighth, counsel for the Plaintiffs performed his services on a contingent fees basis. If the Plaintiffs were successful, he would attempt to collect under the Real Estate Purchase Contract. However, if the Plaintiffs claims were unsuccessful, then he would not collect. This arrangement fostered frugality and conservative use of his time.

Finally, the Plaintiffs have met the requirements of Brown v. David K. Richards & Co., No. 971536, 366 Utah Adv. Rep. 28 (Utah Ct. App. April 8, 1999). Specifically, the Plaintiffs have set forth the "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitled to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." Id. at 30. The Plaintiffs in this case were successful in their Breach of Purchase Agreement and are entitled to attorney's fees for such claim. The Plaintiffs were not successful on their misrepresentation by omission claims. The Plaintiffs were not entitled to attorney's fees for their Breach of Improvement Agreement and their Breach of Real Estate Statutes claims.

Therefore, upon answering the questions set forth in Dixie State Bank, and utilizing the factors set forth in Rule 1.5. of the Utah Rules of Professional Conduct, this Court finds Plaintiffs' requested attorney's fees are fair and reasonable under the circumstances of this case. Therefore, this Court grants the Plaintiffs their attorney's fees in the sum of $48,567.00 which is the attorney's fees expended in prosecuting the Breach of Purchase Agreement claim and such additional reasonable attorney's fees as are incurred for the collection of said judgment. In addition this Court grants the Plaintiffs their costs in the sum of $4,446.31.

CONCLUSION

For the foregoing reasons, this Court hereby rules as follows:

1. Plaintiffs are awarded their attorney's fees in the sum of $48,567.00 and such additional reasonable attorney's fees as are incurred for the collection of said judgment.

2. Plaintiffs are awarded their costs in the sum of $4,446.31.

3. Counsel for Plaintiffs shall prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 14th day of July, 1999.

RAY M. HARDING, JR., JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling with postage prepaid thereon this 15th day of July, 1999, to the following:

Mark O. Morris
SNELL & WILMER L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111-5225

Stephen Quesenberry
Lance N. Long
HILL, HARRISON, JOHNSON & SCHMUTZ
3319 North University Ave., Suite 200
Provo, UT 84604

Christopher D. Ballard
Law Clerk

Tab F

1-27-99 A

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH, Defendant.	JURY VERDICT Civil No. 970400584 Judge Ray Harding Jr.

We the jury in the above entitled action find as follows:

1. With regard to the claim of Michael and Elizabeth Morris against Dan and Cynthia Parkinson for breach of contract, we find for:

(Choose one)

__X__ the Plaintiffs (Michael and Elizabeth Morris)

_____ the Defendants (Dan and Cynthia Parkinson)

2. With regard to the claim of Michael and Elizabeth Morris against Guy Hatch for intentional or negligent misrepresentation, we find for:

(Choose one)

_____ the Plaintiffs (Michael and Elizabeth Morris)

__X__ the Defendant (Guy Hatch)

3. a. If you find for the Plaintiffs Micheal and Elizabeth Morris on any of the claims listed in items 1-2 above, what amount do you find will compensate them for the damages they suffered?

$ 42,220.00 **(write in the total amount of damages).**

b. Of the total amount in line 3.a. above, how much do find should be paid to the Morrises by:

$ 42,220.00 Dan and Cynthia Parkinson for breach of contract.

X Guy Hatch for misrepresentation by omission.

(Total of these two lines must equal the total amount of damages from line 3.a. above.)

4. With regard to the claim of John Covey against Linda Hatch for breach of contract, we find for:

(Choose one)

X the Plaintiff (John Covey)

_____ the Defendant (Linda Hatch)

(If you find for the plaintiff, John Covey, also complete the following):

We award damages to the Plaintiff, John Covey, in the amount of $ 5,000.00.

5. With regard to the claim of Michael and Elizabeth Morris against Guy Hatch for violation of real estate agency statutes, we find for:

(Choose one)

__X__ the Plaintiffs (Michael and Elizabeth Morris)

_____ the Defendant (Guy Hatch)

(If you find for the plaintiffs, Michael and Elizabeth Morris, also complete the following):

We award damages to the Plaintiffs Michael and Elizabeth Morris in the amount of $ 9,792.00

DATED this 26 day of January, 1999.

Kathleen Thomson
Jury foreperson

Tab G

AUG 19 6 01 PM '99
MOT

STEPHEN QUESENBERRY (8073)
HILL, JOHNSON & SCHMUTZ P.C.
Jamestown Square
3319 North University Avenue, Suite 200
Provo, Utah 84604
Telephone: (801)375-6600
Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH, Defendant.	DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL Civil No. 970400584 Judge Ray Harding Jr.

Defendants, through Stephen E. Quesenberry, HILL, JOHNSON & SCHMUTZ, counsel of record, and, pursuant to Utah Rules of Civil Procedure 50 and 59, hereby move the Court for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

This motion is supported by the Memorandum of Points and Authorities submitted

herewith.

DATED this 19th day of August, 1999.

HILL, JOHNSON & SCHMUTZ

STEPHEN QUESENBERRY
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of August, 1999 they caused a true and correct copy of the foregoing to be delivered to the following:

Mark O. Morris, Esq.
SNELL & WILMER L.L. P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111-5225

Sent via:
___ Hand-Delivery
✓ Facsimile
✓ Mailed (postage pre-paid)

Mark O. Morris (4636)
SNELL & WILMER L.L.P.
111 E. Broadway, Suite 900
Salt Lake City, UT 84111-1004
Telephone: (801) 237-1900
Facsimile: (801) 237-1950

Attorneys for Plaintiff

NOV 3 3 50 PM '99

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS and JOHN COVEY,

Plaintiffs,

vs.

DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, GUY HATCH,,

Defendants.

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Honorable Ray M. Harding, Jr.

Case No. 970400584

Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative For a New Trial, came before the Court for a regularly scheduled hearing at 1:00 p.m. on October 28, 1999. Mark O. Morris appeared on behalf of plaintiffs. Stephen Quesenberry appeared on behalf of defendants. After considering the memoranda filed by the parties and hearing Oral Argument, and after reviewing all relevant evidence and all reasonable inferences from that evidence in a light most favorable to the plaintiffs, this Court finds that the jury verdict finding Linda Hatch liable to John Covey for $5,000 and finding Guy Hatch liable to Michael and Elizabeth Morris in the amount of $9,792 is supported by the record herein. Further, this Court

again rejects the defendants' claim that the doctrine of caveat emptor precludes some or any of plaintiff's claims herein. Accordingly,

IT IS HEREBY ORDERED that defendant's Motion for Judgment Nothwithstanding the Verdict, or, in the Alternative, for a New Trial is hereby denied.

DATED this 3rd day of November, 1999.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
4TH DIST COURT - UTAH COUNTY

Honorable Ray M. Harding
Fourth District Court Judge

APPROVED AS TO FORM:

HILL, HARRISON, JOHNSON & SCHMUTZ

Stephen Quesenberry
Attorneys for Defendants

Snell & Wilmer L.L.P.

Mark O. Morris
Attorney for Plaintiffs

Tab H

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
Nov 29 4 05 PM '99
COPY

STEPHEN QUESENBERRY (8073)
HILL, JOHNSON & SCHMUTZ L.C.
Jamestown Square
3319 North University Avenue, Suite 200
Provo, Utah 84604
Telephone: (801)375-6600
Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS; ELIZABETH MORRIS; and JOHN COVEY,	**NOTICE OF APPEAL**
Plaintiffs and Appellees,	
vs.	
DAN PARKINSON; CYNTHIA PARKINSON; LINDA HATCH; and GUY HATCH,	**Civil No. 970400584**
	Judge Ray M. Harding, Jr.
Defendants and Appellants.	

COMES NOW the defendants, by and through their attorney of record, and hereby submits their Notice of Appeal to this Court as follows:

(1) Notice is hereby given that Defendants and appellants, Dan Parkinson, Cynthia Parkinson, Linda Hatch, and Guy Hatch, through counsel, Stephen Quesenberry of Hill, Johnson & Schmutz, appeal to the Utah Supreme Court the final judgment, denial of summary judgment,

and post trial rulings of the Honorable Ray Harding Jr. entered in this matter on November 3, 1999 (final rulings on post-trial motions) and earlier.

(2) The appeal is taken from the entire judgment entered in this matter, including but not limited to the following: denial of Defendants' motion for summary judgment, denial of Defendants' motions for directed verdicts and JNOV, denial of Defendants' post-trial motions, the verdict entered after trial, and various evidentiary issues including jury instructions, motions *in limine, evidentiary rulings, etc.*

DATED this 29th day of November, 1999.

HILL, JOHNSON & SCHMUTZ

STEPHEN QUESENBERRY
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I mailed and faxed a true and correct copy of the foregoing Notice of Appeal, postage prepaid, on this 29th day of November, 1999, to the following:

Mark O. Morris, Esq.
Snell & Wilmer, L.L.P
111 East Broadway
Salt Lake City, Utah 84111
801-237-1950 facsimile

Tab I

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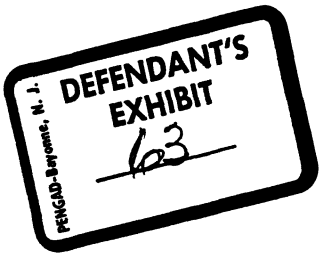
Attorneys for Plaintiffs



IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, GUY HATCH, Defendants.	**AFFIDAVIT OF ELIZABETH MORRIS** Civil No. 970400584 Judge Ray M. Harding, Jr.

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

ELIZABETH MORRIS, being first duly sworn, hereby avers that she is over 18 years of age, she has personal knowledge of the following facts and is competent to testify as to their truth:

1. I am one of the plaintiffs in the above action.

2. I executed the final Addendum to that certain Real Estate Purchase Contract which is attached to the December 15, 1998 Affidavit of Stephen Quesenberry.

3. When my husband and I first began looking to purchase the residence located at 9 North Meadowbrook Drive in Alpine, Utah, and after observing its incomplete condition, it was always my understanding that the home was not yet complete, and that we were purchasing it as a new home.

4. As we walked around the home and inspected it prior to making our offer on the home, we observed a number of areas in the home that were not yet finished, were in poor condition, or were in need of repair.

5. At the time that we submitted the earnest money offer set forth in the Real Estate Purchase Contract on August 22, 1995, my husband and I included in that offer our requirement that the Sellers would warrant the home's quality, workmanship, habitability, systems of all kinds, and the roof on the home for a period of two years following our purchase of the home.

6. Our reason for insisting upon that warranty was based upon the fact that the home was in an uncomplete condition, it was new, and because a number of the conditions in and around the home concerned us regarding the quality, workmanship, and habitability of the home. We also knew that many problems or potential problems in the house would not be apparent to us until we had lived in it for some time.

7. Included among, but not limited to, the items which we observed at the home and which gave us concern regarding purchase of the home were the following:

a. The precarious nature of the circular stairway;

b. The condition and structure of the interior door frames;

c. The existence of only one furnace in the home;

d. The existence of only one air conditioning unit;

e. The existence of crevices and cracks in a number of the window frames;

f. The placement of the rear deck over the window wells on the West side;

g. The unfinished nature of landscaping around the home; and

h. The absence of base trim in the kitchen and kitchen cabinets, and the poor quality of all visible finish work, including a lack of a final coat of paint, lack of final wood floor coating, holes in the walls in need of patchwork, and lack of a final cabinet plan.

8. As a result of the inspections that we performed on the home, we expressly conditioned our purchase of the home upon a promise by the Seller to perform all of the work that is set forth on the August 22, 1995 Addendum to the Real Estate Purchase Contract. Those conditions included a two year warranty by Sellers as to quality, workmanship, and habitability of the home.

9. We included the above language in the Contract because we wanted to make certain that the home that we were purchasing, which was in an unfinished state, would be brought up to code, and would be completed in a workmanlike and quality condition, consistent with the amount of money we were paying for the home and other contractual requirements I obtained through my father, John Covey.

10. By wording the warranty as we did, to include quality, workmanship, habitability, systems of all kinds, and the roof, it was our desire to make the warranty as broad as we possibly could, given the nature of the many defects we observed in the home at the time we agreed to purchase it.

11. Subsequent to purchasing the home, we learned from the Alpine City Building Inspector that no Certificate of Occupancy has ever been issued on our home.

12. At the time we purchased the home, we considered the home as "new," in spite of the fact that Guy Hatch and his family had been living there, because it was not yet completed and he indicated he was the builder and would be moving to another home he was in the process of building.

13. Prior to the time that I signed the August 22, 1995 Real Estate Purchase Contract, I obtained a promise from Guy Hatch that he would complete a number of items on the home in connection with the purchase of the home. It was Guy Hatch's desire that the agreement for this be set forth in a separate contract, to be signed by his wife, Linda, and by my father, John Covey, who was going to advance the additional $25,000 for the added work.

14. Attached hereto as Exhibit "A" is a copy of the agreement between Linda Hatch and John Covey, which includes a number of items that I wanted to have been performed subsequent to our purchase of the home.

15. The "plan" that is set forth in paragraph 7 of the attached contract hereto included repainting and performing other improvements to the home to bring it up to the new and complete condition for which we had bargained when we made the offer on the home.

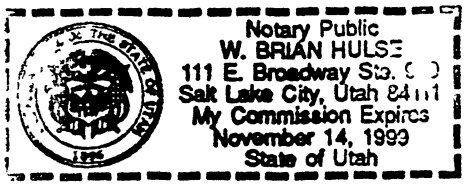
Dated this 4 day of January, 1999.

Elizabeth Morris

SUBSCRIBED AND SWORN to before me this 4th day of January, 1999.

Notary Public
Residing At: Salt Lake City, Utah

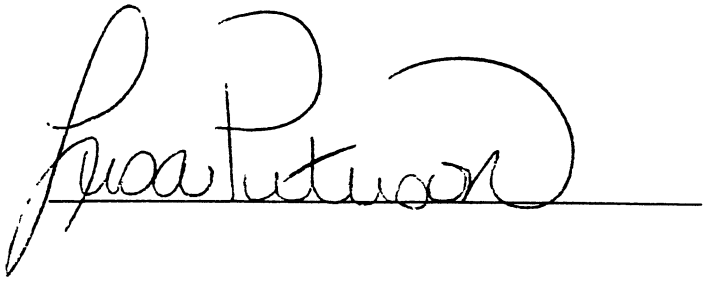
My Commission Expires:



CERTIFICATE OF SERVICE

I do hereby declare that on this 4 day of January, 1999, I caused to be ***mailed*** a true and correct copy of the foregoing ***AFFIDAVIT OF ELIZABETH MORRIS*** to the following:

Stephen Quesenberry, Esq.
HILL, HARRISON, JOHNSON & SCHMUTZ
3319 North University Ave., Suite 200
Provo, Utah 84604



AGREEMENT

Linda Hatch
Design and Decor:

For the sum total of twenty five thousand dollars ($25,000.) agrees to provide materials and consultation for the decorating of a house at 9 North Meadowbrook Drive in the city of Alpine, Utah for Elizabeth Morris.

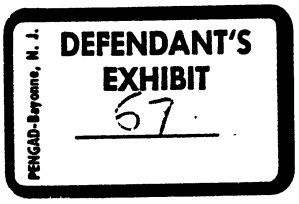
Included in this price is the following:

1. Install sub-zero refrgerator w/ cabinetry.
2. Install new double oven and cooktop w/ cabinetry.
3. Landscape rear yard with sod and sprinkler.
4. Windows washed inside and out.
5. Carpets steam-cleaned.
6. Add additional electric as needed for appliances.
7. Decorate as per plan.

In the event that Elizabeth Morris is unable to close escrow and buy the house at Meadowbrook Drive, the funds will be refunded to her father, John Covey within thirty days of notice.

Linda Hatch 9/6/95 John M R Covey 9/6/95

LINDA HATCH DATE JOHN COVEY DATE



Mark O. Morris, Esq. (A4636)
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111 East Broadway, Suite 900
Salt Lake City, UT 84111-5225
Telephone: (801) 237-1900
Facsimile: (801) 237-1950

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

MICHAEL MORRIS, ELIZABETH MORRIS and JOHN COVEY, Plaintiffs, vs. DAN PARKINSON, CYNTHIA PARKINSON, LINDA HATCH, GUY HATCH, Defendants.	**AFFIDAVIT OF MICHAEL MORRIS** Civil No. 970400584 Judge Ray M. Harding, Jr.

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

MICHAEL MORRIS, being first duly sworn, hereby avers that he is over 18 years of age, he has personal knowledge of the following facts and is competent to testify as to their truth:

1. I am one of the plaintiffs in the above action.

2. I executed the final Addendum to that certain Real Estate Purchase Contract which is attached to the December 15, 1998 Affidavit of Stephen Quesenberry.

3. In the summer of 1995, when my wife and I first began looking to purchase the residence located at 9 North Meadowbrook Drive in Alpine, Utah, and after observing its complete condition, it was always my understanding that the home was not yet complete, and that we were purchasing it as a new home.

4. As we walked around the home and inspected it prior to making our offer on the home, we observed a number of areas in the home that were not yet finished, were in poor condition, or were in need of repair.

5. At the time that we submitted the earnest money offer set forth in the Real Estate Purchase Contract on August 22, 1995, my wife and I included in that offer our requirement that the Sellers would warrant the home's quality, workmanship, habitability, systems of all kinds, and the roof on the home for a period of two years following our purchase of the home.

6. Our reason for insisting upon that warranty was based upon the fact that the home was in an incomplete condition, it was new, and because a number of the conditions in and around the home concerned us regarding the quality, workmanship, and habitability of the home. We also knew that many problems or potential problems in the home would not be apparent to us until we had lived in it.

7. Included among, but not limited to, the items which we observed at the home and which gave us concern regarding purchase of the home were the following:

a. The grade and slope of the area on both sides of the home;

b. The precarious nature of the circular stairway;

c. The condition and structure of the interior door frames;

d. The existence of only one furnace in the home;

e. The existence of only one air conditioning unit;

f. The drop of the stair from the home into the garage;

g. The placement of the rear deck over the window wells on the West side;

h. The unfinished nature of landscaping around the home; and

i. The absence of base trim in the kitchen and kitchen cabinets, and the poor quality of all visible finish work.

8. As a result of the inspections that we performed on the home, we expressly conditioned our purchase of the home upon a promise by the Seller to perform all of the work that is set forth on the August 22, 1995 Addendum to the Real Estate Purchase Contract. Those conditions included a two year warranty by Sellers as to quality, workmanship, and habitability of the home. The warranty was negotiated, as the Sellers originally wanted the warranty to be for only a one year period. We rejected that proposal.

9. We included the above language in the Contract because we wanted to make certain that the home that we were purchasing, which was in an unfinished state, would be completed according to code, would be completed in a workmanlike and quality manner, and would address hidden and latent defects that would manifest themselves as we lived in the home, consistent with the amount of money we were paying for the home.

10. By wording the warranty as we did, to include quality, workmanship, habitability, systems of all kinds, and the roof, it was our desire to make the warranty as broad as we possibly could, given the nature of the many defects we observed in the home, and the potential for latent

defects, at the time we agreed to purchase it.

11. Subsequent to purchasing the home, we learned from the Alpine City Building Inspector that no Certificate of Occupancy has ever been issued on our home.

12. At the time we purchased the home, we considered the home as "new," in spite of the fact that Guy Hatch and his family had been living there, because it was not yet complete and he indicated he was the builder, and he would be moving to another home he was in the process of building.

Dated this 14 day of January, 1999.

Michael Morris

SUBSCRIBED AND SWORN to before me this 14th day of January, 1999.

Notary Public
Residing At: Salt Lake City, Utah

My Commission Expires:

Notary Public
W. BRIAN HULCE
111 E. Broadway Ste. [illegible]
Salt Lake City, Utah 84[illegible]
My Commission Expires
November 14, 1999
State of Utah

CERTIFICATE OF SERVICE

I do hereby declare that on this 4 day of January, 1999, I caused to be ***mailed*** a true and correct copy of the foregoing ***AFFIDAVIT OF MICHAEL MORRIS*** to the following:

Stephen Quesenberry, Esq.
HILL, HARRISON, JOHNSON & SCHMUTZ
3319 North University Ave., Suite 200
Provo, Utah 84604